THE LAW

OF

CONSTRUCTIVE CONTEMPT.

THE SHEPHERD CASE REVIEWED.

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Boni judicis est ampliare jurisdictionem.

"*Men are not corrupted by the exercise of a power or debased by the habit of obedience: but by the exercise of power, which they believe to be illegal and by obedience to a rule, which they consider to be usurped and oppressive.*"— De Tocqueville.

The Law of Constructive Contempt.

THE FREEDOM OF THE PRESS — THE SHEPHERD CONTEMPT CASE REVIEWED.

PRELIMINARY STATEMENT.

In a proceeding, by attachment for contempt, against J. M. Shepherd, editor of the Warrensburg *Standard Herald*, the Supreme Court of Missouri, in July, 1903, assumed jurisdiction to try and fine Mr. Shepherd for publishing, in his paper, an editorial, which the court held to be a libel upon itself.

This was the first time the Supreme Court, or any other court in Missouri, ever assumed to exercise such jurisdiction in such case. The people had supposed for eighty years that when a person chose to criticise any officer or judge of the State, by newspaper publication, he would enjoy the right to be tried by a jury of his peers, for any alleged abuse of his privilege of saying, writing, or publishing "whatever he will on any subject;" and this action of the court created almost universal surprise among the people, and it has brought to the fore, again, a question that a century or more ago engaged the energies and abilities of the wisest statesmen and publicists of England and the United States.

In October, 1903, the Supreme Court in banc, through Mr. Justice Marshall, filed an

opinion, in which all concurred, giving, at great length, its reasons for its assumption of jurisdiction in the case, and it is this opinion I propose to review in this paper. I do this because I feel sure some of the principles laid down by the court are fundamentally wrong, and contravene essential tenets of liberty — that is, the freedom of the press, and the right of trial by jury for an alleged abuse of such freedom. These principles, laid down by the court, are not, in my humble judgment, sound, and ought not to be acquiesced in by the people, and thus become part of the permanent law of the State.

And at the threshold of this discussion, I do not desire to be understood as impugning the motives or sincerity of the judges who wrote and concurred in the opinion in this case. I was judge of the Circuit Court ten years, and of the Supreme Court two years, and I believe I have as high an appreciation of the majesty of the law, and of the dignity and independence which should appertain to a judge in the performance of his duties as any man living, and I would not say a word to lessen the esteem of the public for the courts; and in this review I desire it to be distinctly understood that I combat, and intend to combat only the reasoning and conclusion of the court, and not its motives.

I wish to add at this point that I want it to be distinctly kept in mind in reading this review that I can conceive of no greater calamity that could befall a State than to have

trial by newspaper prevail and for the courts to be swerved from the right course by outside influences. Courts ought to be left absolutely free from the passion of the hour in their adjudications upon the rights of man. It ought to be so that when a judge says "it is the opinion of the court," the uttermost parts of the republic ought to "feel and obey the mandate," but this can never be the case when the court exercises a doubtful jurisdiction on a subject of such absorbing interest as the freedom of the press and the right of trial by jury. My sole object in writing this review is to vindicate the rightful authority of the law-making power without, however, depriving the judiciary of that dignity and independence which ought always to attend the administration of the law in civilized society.

STATEMENT OF THE CASE AND OF THE QUESTION TO BE DISCUSSED.

One Henry R. Oglesby, a brakeman in the employ of the Missouri Pacific Railway Co., was injured by the derailment of a train on the road of that company in 1892, for which he brought suit, and with varying results the case was in the Circuit and Supreme courts till 1903, when the latter court, by a majority vote, held that the plaintiff could not recover, and refused to remand the case for a new trial. It was for criticising the Supreme Court in connection with this case that Mr. Shepherd was fined five hundred dollars. After the fine was imposed the people of

Warrensburg paid it. A mass meeting was held and a telegram sent to him to "hold a stiff upper lip." Another telegram was soon after sent, telling him to "draw on Citizens Bank for any amount needed," signed "Citizens Committee." He drew for enough to pay the fine and costs and went home in triumph, and incidentally it may be noted here that the objectionable article was also published in the Sedalia *Capital* without comment, and its editor, Mr. J. J. Cundiff, was also attached for contempt, and fined one dollar.

It is not the intention of the writer to call in question many of the positions taken by the court in the Shepherd case, for many of them are unquestionably sound. But the object of this review is to show that the court was in error in holding the contempt statute unconstitutional and void, and in assuming jurisdiction to try and punish the respondent by the process of attachment for contempt, and to these two points this discussion will be confined.

The opinion of the court in the Shepherd case is printed in full in Appendix L.

THE AUTHOR'S VIEW OF THE QUESTION IN 1884.

In 1884 I read before the Conference of the *Nisi Prius* judges of this State, of whom I was then one, a paper on the main question involved in the Shepherd case, a part of which I desire to quote here, as that paper was prepared from the view point of a judge,

and this review is from the view point of a citizen in private life. In the paper referred to, I said: —

"The motion that was made and carried at our conference at Sweet Springs on the 26th day of July last, that I prepare and read to you at this time a paper upon the law applicable to contempt of court in this State, was prompted by an informal discussion that took place among us at that time in regard to the dangers to our institutions likely to grow out of 'trial of causes by newspaper,' and during the discussion, the inquiry was made, 'What is the limit of the authority of courts of record to punish, by the process of attachment for contempt, parties who publish or write articles which tend to influence the decision of a pending cause?' and what I have to say now will be mainly directed to that phase of the subject of contempt of court. This is an exceedingly interesting and important question, not only in its historical aspect, but also in its bearing upon the development of the science of law, and the growth of free institutions. Every thoughtful man naturally inquires, How can the freedom of the press in its full vigor, and the independence of the judiciary, be preserved and maintained at the same time?

Theoretically, this question is easily answered. If we reason *a priori* no one would hesitate to say that the courts ought to be clothed with the power to suppress, summarily, any attempt by any one to improperly

influence the determination of a pending cause by extraneous matter, and to turn aside the even course of justice by the excitation of public indignation and clamor; but in reaching a practical solution of the problem we encounter serious and almost insurmountable difficulties. I listened last summer at Saratoga to a most interesting paper read by Mr. Sheet of Texas to the American Bar Association, on 'How far Public Policy ought to influence and control Judicial Decisions.' The writer reached a conclusion that was, *in theory*, far from satisfactory to the members of the Bar present, and which antagonized the adjudged cases in England and America. He argued, with much cogency, and apparent ingenuousness, that the construction of the Federal and State constitutions, and the statutes made in pursuance thereof, by the Judiciary was not authoritative and binding upon the executive and legislative departments of government. There wa no question but that *theoretically* he was wrong, but practically, right. This phase of the question is exemplified fully in the ultimate outcome of the Dred Scott decision. While Chief Justice Taney's decision remanded Dred Scott to slavery, the *principle* of that decision was ignored by the political departments of the government, and was finally overborne by them. In all communities where the masses participate in the government, public opinion will ultimately be voiced in statutes, or crystallized into 'the law

of the land,' in defiance of the sages of the law, and the judicial determination of the courts. The Legal Tender decisions are sad reminders of the silent power and influence of the executive in our courts. And public opinion is pressing the principle of the Dartmouth College cases to the wall.

All the instances I have named are of Federal origin, where the judicial department is as far from the interference of the political departments as it is possible to make it. If we find that the political power finally controls the determination of legal questions in the judicial administration of the general government, *a fortiori*, will we find this influence more potent in the administration of affairs in the States, where the people elect their judges, as well as their governors and legislators.

Now, if we view the question of contempt in the light of history, we will find that this same public opinion has gained the mastery over the courts, and has voiced itself in statutes limiting the power to punish by the summary process of attachment. The freedom of the press has cost too much in blood and money to be lightly esteemed. It is deservedly dear to the lovers of liberty everywhere. The shouts of the people of London — of London, ever loyal to her sovereign — when they carried Lord Erskine through the streets after his famous speeches in the defense of Horne Tooke, Thelwall and others for their criticisms of the government,

are but the expressions of the sympathies and opinions of the masses of our own times and of all times. Those shouts though given out by excited men were not the utterances of the moment simply, but were deep manifestations of the popular mind in its determination to strike off the last fetters that enthralled the press. The people have fought for freedom of speech, and of the press, and they will maintain it at all hazards. In my mind there is no greater boon vouchsafed our times than the press. But the independence of the Judiciary is of equal importance with the freedom of the press. Lord Erskine, the great defender of free thinking, free speaking, and free printing, also found means, while upon the bench, to vindicate and uphold the integrity and independence of the courts.

Public opinion is like the pendulum of a clock. It constantly swings from one extreme to another. Once in England the people got nothing from the press but what came filtered through the sieve of the censors, and was marked and licensed like our cigars and wine. We cannot well avoid comparing this with the exploit of that gallant man who thought to pound up the crows by shutting his park gate. Now we have not only an unlicensed but a sensational press; then, *just* criticism was stifled. Now there is nothing too sacred to exempt it from vile vituperation and slander; then, the courts prohibited the publication, without permission, even of true accounts of causes pending before them.

Now, we have laid before us daily, not only true, but often one-sided and distorted accounts of cases on trial, often accompanied by comments, unfavorable to one side or the other. And yet deep down in the hearts of the masses, we find a popular reverence for the Bench, which pervades all classes. The Judiciary is regarded as the balance wheel of our system. To it the people look for the preservation of their institutions. This branch of the government is eminently conservative in its tendencies; and confidence in its integrity, and respect for its authority are essential to its efficiency. But the power to punish for contempt, as it has been exercised, has always, especially in America, been viewed by the people with jealousy. This power is in its nature arbitrary, and antagonizes those great principles of liberty, ever held dear to the subject and citizen, in clothing a party with authority to sit as judge in his own case, in compelling a party to give evidence against himself, and in denying the right of trial by jury. But the courts have met but little opposition from the people to the enforcement of order in their own precincts, and obedience to their lawful orders; because such authority has always been regarded as essential to the transaction of business, and the administration of the law, and so long as courts confined themselves to this limit, they were heartily sanctioned, and even where they assumed jurisdiction to punish for contempt not committed in their im-

mediate presence, where no great principle of liberty or right was infringed, they met no opposition; but where they have assumed to determine the extent to which criticism of their conduct could be carried by the public press, they have encountered fierce, and oftentimes successful resistance.

The people have, for centuries, fought for the right of trial by jury and the freedom of the press, and it is not to be wondered at that the power to arrest without warrant, and try without jury, and punish in a summary and arbitrary manner, was received with alarm, and that such power, in so far as it affected the press has been resisted by the executive and legislative branches of the government; because there the popular sense found expression more easily than in the courts. Blackstone says, 'The process of attachment for these and like contempts must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempt by immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.'

This is the general common law doctrine, but the elementary writers, as well as the adjudged cases all concur in limiting the power to punish for contempt committed by a letter,

writing or publication, to those cases only where there was an attempt to influence the ultimate decision of some proceeding pending in court. If the proceeding had terminated by the entry by the court of the final order, then this power ceased, and a party offending could be punished only by indictment or information."

After a review of the authorities, I proceeded: "I think also that a review of the above and other authorities will show that statutes prescribing what shall be held to be contempt, when there are no restrictive or negative words used, will not oust the common law jurisdiction of the courts to punish for other common law contempts. Such statutes are held to be declaratory only of the common law to that extent. And so the courts have, with one or two rare exceptions, held that the bill of rights to be found in the Federal and American constitutions, securing freedom of speech, and of the press to the citizen, and securing to every one the right of trial by jury, or to 'due process of law,' has not deprived the courts of their inherent power to protect themselves, and vindicate their own honor and dignity. The power to punish for contempt was a part of the common law, and was confirmed by Magna Charta, and when one was fined or imprisoned by this process, he was held to have been fined or imprisoned according to the law of the land."

After quoting our Bill of Rights in regard to free speech and a free press and the con-

tempt statute in full. I concluded as follows: "After having said what I have on the general subject of contempt, I do not deem it necessary to enter into any lengthy disquisition in regard to the construction of these various statutory and constitutional provisions, and the limitations imposed on the authority of the courts of Missouri to punish parties guilty of contempt by the process of attachment and I shall content myself with a very brief summary of my views on the subject.

My first position, and the one that will probably interest you most, is that the legislative department of the government has the power to control and restrict the judicial in the exercise of its authority to punish for contempt, and that the latter cannot go beyond the limitations prescribed by the former. This position thus formulated is the result of the inexorable logic of events, and is attributable to the growth of the law under democratic institutions.

My second position is that the provisions of our statutes, which I have quoted, oust the common law jurisdiction of the courts in Missouri over contempts, and have set limits to their authority, beyond which they cannot go. The judiciary is confined to the acts enumerated in the statutes, and in the language of Section 1055, can punish for 'no other.' The statutes of 1879 on the subject are literally what they were in 1835. Prior to that time, however, no negative or restrictive words

were to be found in our legislation, and of course the courts were not restricted to the acts named, but could exercise their common law jurisdiction in the matter. Without the negative and restrictive words 'no other,' or, as Chief Justice English in the Morrill case terms it, 'the prohibitory feature of the act,' the rule would, according to the weight of authority, be otherwise than I have above assumed.

Third: No criticism by the public press of the conduct of judges, witnesses, jurors, officers of the court or parties, is an act punishable by the process of attachment for contempt in Missouri, though made with a view of influencing the determination of a pending cause, and turning aside the course of justice. This phase of the question has never to my knowledge been before our Supreme Court, and hence our statute in that particular has never been construed by that court, but Judge English, in speaking of the terms of the Arkansas statute, which is, as I have said, a verbatim copy of ours, in the Morril case, pointedly said: 'It is conceded that the act charged against the defendant in this case is not embraced within either clause of this statute.' ''

All of this I fully indorse to-day, after twenty years of reflection and careful study.

THE QUESTION TO BE DISCUSSED IN THIS REVIEW.

Did the General Assembly of this State have the constitutional power in 1835, and has it

now the power, to pass the statute on the subject of contempt of court, which the Supreme Court, in the Shepherd case, set aside as unconstitutional in order to acquire jurisdiction in that case?

The question involves also the meaning of the article in our constitution, which has from the beginning remained the same, distributing governmental power among the three co-ordinate departments of the State government, and the meaning of the words "the judicial power," and the words "the legislative power," as they have been used in the several constitutions, that have been in force in the State, that of 1820, that of 1865, and that of 1875, the latter being now in force.

If the question, here propounded, be answered in the negative as it was answered by the Supreme Court in the Shepherd case, all the other positions taken by the court that the defendant was not entitled to a trial by jury; that the punishment inflicted was according to "the law of the land," etc., follow as necessary corollaries of this answer. But if it be answered in the affirmative, as I shall answer it, then the jurisdiction of the court to impose the fine in the Shepherd case falls to the ground, and with it all the other positions taken by the court. In order to fully and clearly understand the discussion in regard to the meaning of the articles in our constitution distributing the powers of the government, and confiding "the legislative power" to the General Assembly, and "the

judicial power" to the courts, as applicable to the question under discussion, it is necessary to review, briefly, the history and evolution of the law of contempt, the law of libel, the freedom of the press, and the right of trial by jury in libel cases. This history I will divide into four epochs. First, prior to 1820, when our first constitution was adopted, second, from 1820 to 1835, when the contempt statute, in its present form, was first adopted; third, from 1835 to 1875, when our present constitution was adopted, and fourth, from 1875 to 1903.

FIRST EPOCH.

The history and evolution of the law of contempt, the law of libel, the freedom of the press, the right of trial by jury in libel cases, prior and up to 1820, when our first constitution was adopted.

PUBLICITY — THE QUESTION IN ENGLAND.

The publication of the Proceedings of Parliament, and of the legislative assemblies of the American Colonies, was not allowed a century and a half ago. The theory was that the law-givers and rulers should be left to act absolutely freed from the restraints of public opinion, and that the people did not know, and could not know what was best for the public weal. The Revolutions of 1640–50 and 1688–9 awakened the people, not only in England, but in the Colonies, to a full realization of their power and their rights, and it developed that they could not intelligently participate in their government, and apply appropriate remedies for the evils they might

find in the administration of public affairs, without a knowledge of the acts of those clothed with authority. To us of to-day it seems strange that such a self-evident proposition as that the people should know what their rulers are doing should ever have been questioned or doubted. But the fact is, the struggle for the publicity of legislative and governmental proceedings of every kind was a long and fierce one. It was full of bitterness and vituperation. Even judicial proceedings were at one time frequently kept from the public. The "Star Chamber," in its secret halls, and behind barred doors, was once a terror to the people. A curious episode in this connection in the history of Pennsylvania may be cited. In 1687 William Bradford, a printer whom Penn had induced to come to the province, was severely censured by the Council, presided over by the governor, for *printing the charter of the province.* This occurred in Pennsylvania which afterwards became the battle-ground for the fiercest, most spectacular and triumphant struggle for the freedom of the press to be found in our annals. This struggle will be noted later on.

The period between 1765 and 1801 was noted for its struggles for the rights of the masses of the people, and the principles of liberty. In that period the American Colonies won their independence. In 1769 a struggle for the freedom of the press was begun in England by John Wilkes, which was taken up afterwards by Horne Tooke, Thomas Paine,

Lord Erskine, Fox and others, which terminated in 1792 in the passage by Parliament of what is known as "The Fox Libel Act." Prior to that act in a criminal prosecution for libel, the accused was not allowed to prove the truth of the charge he had made, it being gravely asserted that "the greater the truth, the greater the libel." As showing the state of the law of libel on this point in the American Colonies, and even in the American States a hundred years ago, I call attention to the cases of McDougal and Crosswell, both New York cases. (Appendix A.) Prior to the Fox Libel Act it was also well settled that the question of libel or no libel was for the court alone, with which the jury had nothing to do; but that act revolutionized the whole law of libel by providing that in all suits and prosecutions for libel, the truth of the charge may be given in evidence as a defense; and what was still more important, the jury should, under the instructions of the court, be the judges of the law and fact. In other words, the jury was made the judge not only whether the publication had been made but also whether that publication was libelous or not; and of course the jury, after that act, as well as before, was the sole judge of the degree of punishment, which should be inflicted in a criminal proceeding, and the amount of damages to be awarded in a civil case.

The Fox Libel act not only embodied these great principles, but it also declared that the provisions of the act had always been the

law, though previously the courts had uniformly held the contrary. It was during our Revolutionary struggle, and before the passage of the Fox Libel Act that Blackstone's Commentaries were written and published, and in weighing what he says about the common law it must be constantly borne in mind that he was a Tory of the strictest sect, and was an ultra believer in the divine right of kings, and of kingly prerogatives. While Blackstone is perhaps the greatest law commentator of the world on the law in general, what he says, when he comes to treat of prerogatives and governmental power, must be scrutinized very closely, when we, Americans, come to apply it in our affairs under our free institutions. I throw out this caution, because we now have to deal with the common law of England, not as it existed at the time Blackstone wrote, but as it existed in 1820, at the time our first Constitution was adopted. There is another Englishman who, in my judgment, comes nearer representing the later English spirit up to the time of his death, in 1823, and of the American spirit on the subject under discussion than Blackstone, or any other foreigner. I refer to Thomas Erskine, Lord Chancellor of England. He was a consistent Whig, and before he became Lord Chancellor he was foremost in the fight for the freedom of the press, and it was through his influence very largely that the Fox Libel Act was put through Parliament. In 1807, while Lord Chancellor, one McNamara pub-

lished an article which was a gross misstatement of the proceedings of the court in a case decided the day before, and was manifestly printed for the purpose of exculpating the defendant in public opinion, and of rendering odious his opponents. He was attached for contempt, and Lord Erskine disposed of the case thus: —

"Though this was certainly a case in which the court might commit the offender as for a contempt, it still remained to be considered whether the exercise of the discretion which the court must necessarily have in such a case, it ought to do so, and that exercising that discretion, he certainly would not commit him."

And though he afterwards sent a party to the Fleet for a like contempt of court, his final opinion of such a question, at the close of his great career, is recorded by Lord Campbell in his "Life of Erskine." After speaking of Lord Erskine's visit to Scotland in 1821 this historian adds: —

"The illustrious stranger next visited the Court of Justiciary, and appeared there with the star of the Order of the Thistle blazing on his breast. The question to be considered was one that had occupied his thoughts much while he was Lord Chancellor — How far judges should interfere to punish in a summary manner printed comments on their own proceedings. A schoolmaster in Glasgow had published in a newspaper a letter disapproving, to the full, of a judgment of his

Lordship's and the Lord Advocate complained of this as a contempt of court, for which the culprit ought to be immediately committed to the Tolbooth. Mr. Cockburn, the defendant's counsel, argued that he had not exceeded the bounds of legitimate discussion, and that, at any rate, the case ought to be submitted to the determination of a jury, in the ordinary course of law. The court, however, asserted its jurisdiction, and passed sentence of imprisonment. Lord Erskine decorously concealed his expression of opin ion while he remained on the bench, *but in private lamented that in Scotland, 'trial by jury should be thus superseded.'* ''

I give this not for the purpose of showing that the courts of England did not have the power, by common law, to punish as for a contempt a publication in a newspaper, but to show that, according to Erskine, there was some question about it, even in that country, and especially after the passage of the Fox Libel Act.

THE HISTORY OF THE LAW OF CONTEMPT, LIBEL, AND TRIAL BY JURY IN THE AMERICAN STATES PRIOR TO 1820.

The McKean Case. — The first contest in regard to contempt occurred in Pennsylvania in 1788. Thomas McKean, a signer of the Declaration of Independence, and a staunch patriot during the whole Revolutionary period, was, that year, Chief Justice of that State, and one Eleazar Oswald was attached and brought before him and his associates,

and punished for contempt of court in publishing an article in his newspaper which the court held reflected on the parties to the suit, and the court, and was calculated to turn aside the course of justice in a pending case. Oswald carried the case to the Legislature, and out of fifty-seven votes, twenty-three voted to condemn this action of the court. See Appendix B for a full report of this case.

The Shippen Case. — In 1804 Edward Shippen was Chief Justice of the Pennsylvania Supreme Court, and he and his associates proceeded against one Passmore for contempt for the publication of a libel on the parties in a pending suit, and fined him fifty dollars, and ordered him imprisoned for thirty days. Passmore carried this case also to the Legislature, and the Lower House, by a vote of 65 to 16 presented articles of impeachment against Shippen and his associates for this judgment, and on a trial before the Senate they were acquitted by a vote of thirteen against them to eleven for them, the prosecution failing *because a two-thirds vote of the Senate* was required to convict. A report of this case will be found in Appendix "B."

Now it must not be forgotten that both of these cases arose, and were decided before any law had been passed by the Legislature of Pennsylvania restricting the jurisdiction of the courts in contempt cases, and in a State, too, that gloried in the fact that it had inherited the common law of England instead of having introduced it by statute as was done

in Missouri. But after the decision in the Oswald case in 1788 the people of Pennsylvania began an agitation for a legislative restricting act; but Chief Justice McKean's opposition up to 1808 was too strong to be overcome. But as soon as he went out of office as governor, the people asserted themselves, and in 1809 enacted a law under the administration of Governor Snyder, expressly prohibiting the courts from exercising jurisdiction in a contempt case to punish for "publications out of court, respecting the conduct of judges, officers of court, jurors, witnesses or parties," and so vigorous was the protest of the people then against the exercise of the power to punish by attachment for newspaper publication, that no judge of Pennsylvania has, from that day to this, dared to call that statute in question.

In New York after the trial of Crosswell heretofore referred to, the General Assembly of that State in 1805 passed a law similar to the Fox Libel Act.

THE ALIEN AND SEDITION LAWS OF 1798.

I will not go into the details of these laws, nor the trials thereunder, as full reports of these appear in Appendices "C," "D," "F" and "G." Suffice it to say here that Mr. Thomas Jefferson in his presidential campaign of 1799–1800 made a direct appeal to the people from the prosecutions under these laws, condemning them on the ground of their unconstitutionality, and won; and so odious did he and his adherents make this

class of laws, that never since has there been the slightest desire to renew them, with the exception, however, of what occurred after President McKinley's assassination. Upon that ever-to-be lamented event — there was some wild talk, all over the country, not confined to party lines, demanding some repressive measure against the teachings of anarchists, but this talk was never crystallized into law.

THE HISTORY OF THE QUESTION IN MISSOURI.

The territory west of the Mississippi was not an English colony, but Spanish, and when we acquired the same in 1803, Spanish laws were in force and remained in force till 1816, when the territorial legislature passed this act: "The common law of England, which is of a general nature, and all statutes made by the British Parliament in aid, or to supply the defects of, the common law, made prior to the fourth year of James First, and of a general nature, and not local to that kingdom, which said common law and statutes are *not contrary to the laws of this territory*, and not repugnant to, nor inconsistent with the constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the legislature, any law, usage or custom to the contrary notwithstanding; provided, however, that none of the British statutes respecting crimes and punishments shall be in force in this territory; nor shall any person be punished by commom law, when the laws of this territory have made provisions on the subject;

but where the laws and statutes of the United States, and this territory, have not made provision for the punishment of offenses, the several courts may proceed to punish for such offenses provided the punishment shall in no case be other than fine and imprisonment, and the term of imprisonment shall not exceed two months, and the fine shall not exceed one hundred dollars."

So far as I have been able to discover, there had not, prior to 1820, been a single case decided in the American States after the Passmore case, in which a party was punished by the court, as for a contempt, for a publication in a newspaper, and I know there was none declaring the legislature had no power to pass a law, forbidding the exercise of such jurisdiction for such publication.

This was the state of the law, and these were the conditions under which the people of Missouri wrote and adopted the Constitution of 1820. That Constitution in Art. 2, declared "The powers of government shall be divided into three distinct departments; and no person, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Sec. 1, Article 3 provided: "The legislative power shall be vested in a General Assembly, which shall consist of a Senate and of a House of Representatives."

Sec. 1, Article 5 was as follows: "The judicial power, as to matters of law and equity, shall be vested in the Supreme Court, in a Chancellor, in Circuit Courts, and in such inferior tribunals as the General Assembly may from time to time order and establish."

Sec. 16 of the Bill of Rights provided: "That the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may fully speak, write and print on any subject, being responsible for the abuse of that liberty; and in all prosecutions for libel, the truth thereof may be given in evidence, and the jury may determine the law and the facts under the direction of the court."

SECOND EPOCH.

The history of this question from the adoption of the Constitution of 1820 to the enactment of the contempt statute in 1835.

In the revision of the statutes of 1825, there was a chapter headed "Judicial Power," and under that head the following section appeared: "That the several courts aforesaid shall, respectively, have power to punish, by fine and imprisonment, the officers of their courts respectively, for any official misconduct, and all such officers, parties, jurors and witnesses, for any disobedience of the process of the court; and any person whatsoever for any contempt by him committed towards such courts, or for any disorderly or contemptuous behavior in their presence, while in session, or in any manner obstructing the administra-

tion of justice, and to issue attachments against any person so offending. *But in no case shall the fine exceed one hundred dollars, nor the imprisonment be for a longer period than thirty days*, and until the fine and costs are paid." There being, however, no negative words restricting the jurisdiction of the courts to the cases enumerated, under the general rule as applied by the courts, that statute would probably have been construed to be declaratory of the common law, so far as it went, and did not restrict the jurisdiction of the courts to the instances named, *but as to the fine and imprisonment the courts were absolutely limited* by that act.

In the revision of the statutes in 1825, the statute introducing the common law into our State was somewhat modified, so as to read as follows: —

"The common law of England, and all statutes and acts of Parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, and which common law and statutes are *not repugnant to, or inconsistent with* the Constitution of the United States, the Constitution of this State, *or the statute laws in force for the time being*, shall be the rule of action or decision in this State, any law, custom or usage to the contrary notwithstanding."

The second section limited the punishment under the common law to a fine of one hundred dollars, and imprisonment two months.

And thus the law stood in the revisions of 1835, 1845, 1855, 1865, 1879 and 1889, and thus it stands to-day in the revision of 1899.

The Peck Impeachment Case. — This arose in 1826–31, and was a fierce contest along the same lines on which the McKean and Shippen cases were waged. James H. Peck was judge of the United States District Court of Missouri, and attached Luke Lawless, an attorney of the court, for contempt, for publishing an article criticising one of his opinions, and ordered Lawless imprisoned for twenty-four hours and be disbarred. Lawless appealed to Congress, and after many efforts the House of Representatives, in 1830, by a vote of 123 to 49 impeached Peck, and James Buchanan, afterwards President of the United States, and Mr. Storrs, of New York, were appointed prosecutors on behalf of the House. On a trial before the Senate the vote stood for impeachment, 21; against impeachment, 22. On this trial Mr. Buchanan in one of his speeches said: "I will venture to predict that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." This expressed the public opinion then prevailing about the exercise of this power. From the trial of Shippen in 1804 no judge except Peck had attempted to exercise such power. A full report of the Peck case is given in the Appendix "H."

The trial of this case created a profound

sensation in the whole country, on account of the fundamental principle of liberty involved in it, and the eminence of the parties engaged in it. Judge Peck escaped conviction more because many senators believed he sincerely thought he had jurisdiction to punish Mr. Lawless in the way he did, than upon the ground that he actually had such power. And at the same session of Congress Mr. Buchanan introduced, and had passed, a statute, approved March 2, 1831, which is reported in full in the Peck case in the Appendix. That act was very much like ours, and limited the Federal courts to certain specified classes of contempts, and no other. Virginia followed in April, 1831, with an act from which ours is literally copied. Other States soon followed with similar statutes, and four years afterwards our Legislature in 1835, though up to that time no court in the State had attempted to go beyond the statute of 1825, but to make assurance doubly sure, however, enacted the contempt statute which has been in full force ever since, and put it in the Revision of 1835 under the head "The Courts — Judicial Power." This statute will be found in full in Appendix "I;" the sections being numbered as they are in the Revised Statutes of 1899. The enactment of this statute was unquestionably the result of the Peck trial, and was intended to put an end to any claim of our courts in following Judge Peck's precedent for the exercise of the general power to punish for contempt conferred by the common law.

THIRD EPOCH.

The history of this question from 1835 to 1875, when the Constitution now in force was adopted.

In 1840 and 1844 the Congress of the United States, with the approval of the President, to emphasize the protest of the people against the exercise of unwarranted power, refunded the fines, with interest, which had been imposed on Lyon, Cooper and Haswell, under the Sedition Law, at the same time condemning the law under which they had been convicted, notwithstanding the fact that the several courts, sitting in those cases, had upheld its constitutionality.

The contempt statute of 1835 went into the Revised Statute of 1845 without change, under the head "*The Courts: Judicial Power.*" In 1847 this statute was the subject of judicial interpretation in Harrison *v.* Missouri, 10 Mo. 687. Harrison was fined one hundred dollars by the Circuit Court of Saline County for a breach of the peace, and for noisy and disorderly conduct in the presence and hearing of the court, directly tending to disturb its proceedings, and to impair the respect due its authority. At the same term the court remitted forty dollars of the fine, and issued an execution for the remainder, sixty dollars. At the next term of court Harrison moved to quash this execution, on the ground, among others, that the fine exceeded the maximum fixed by law in such cases; and thereupon the court remitted ten dollars more, leaving the fine fifty dollars.

Harrison appealed, and made the point that the fine was void, and that the court, after the close of the term at which it was imposed, had no power to change the amount to bring it within the limitations of the statute. The court after quoting a section of the statute of 1845, which is the same as 1617 of the Revised Statutes of 1899, said, on this point: "Thus it will be seen that the Circuit Court has the power to punish summarily by fine and imprisonment for a contempt committed in its presence; but the fine shall not exceed fifty dollars, nor the imprisonment ten days. In imposing the fine of one hundred dollars on the defendant, the Circuit Court clearly exceeded its powers. This was remedied or corrected in part by the exercise of an unquestioned right of the court to amend or vacate its judgment at any time during the continuance of the term, at which the judgment, amended or set aside, was rendered. But after the judgment was first amended by the remission of forty dollars, the fine against the defendant still exceeded the power of the court. The judgment is not absolutely void, for the court had power to punish for the contempt, and thus had jurisdiction, but erroneous, because *the fine exceeded in amount the maximum prescribed by statute.*" The court then goes on to hold that the lower court had no power, at a subsequent term, to reduce the fine, and reversed the case without remanding it, thus holding the whole proceeding void *ab initio.*

Attorney-General Stringfellow did not raise the point of the constitutional power of the legislature to pass the statute, nor did the court. The judges and lawyers of 1847 belonged to the generation that had witnessed the fierce constitutional controversy in the Peck case, and stood near enough to the contest in Pennsylvania, in the McKean and Shippen cases, and in the United States, in the cases arising under the Sedition law of 1798, to hear their echoes, and in the Harrison case there was absolute acquiescence by the court, and the lawyers engaged in the case, in the legislative power to pass the contempt statute, and the court rigorously enforced its provisions in regard to the fine.

The contempt statute, with this interpretation of it, went into the Revised Statutes of 1855 and 1865 without change, and in the latter year a new constitution was adopted, in which were incorporated substantially the provisions of the Constitution of 1820 in regard to the distribution of the powers among the three co-ordinate departments of the government and in regard to the legislative and judicial powers, and it was declared that "all statute laws in this State, now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be *amended or repealed by the General Assembly.*"

In 1866 the contempt statute was under examination by the Supreme Court in the matter of Green Co. v. Rose, 38 Mo. 396. In that case the Probate Court of Green County

had fined Rose one hundred dollars for failing to make settlement as curator of a minor's estate, according to the order of the court. The Supreme Court quoted Section 67, p. 542 R. S. 1855, which is the same as Section 1618 R. S. 1899, in support of that ruling. Thus the court upheld that statute. No question about its constitutionality was raised or discussed.

FOURTH EPOCH.

The History of the Question from 1875 to 1903.

Then comes the constitution of 1875. The contempt statute had been on the statute books for forty years under the head of "The Courts: Judicial Power," in the Revisions of 1835, 1845 and 1855, and under the head "The General Powers and Duties of Courts," in the general statutes of 1865, and if any layman, lawyer or judge had, in that forty years, entertained a doubt of the constitutionality of that statute, his opinion is not recorded so far as I have been able to discover. The statute, introducing the common law as heretofore given, was in force and incorporated in the general statutes of 1865.

In the light of this history the constitution of 1875 was written and adopted. It must be assumed that the members of that convention, some of whom were the most eminent lawyers and statesmen of our State, were familiar with the history of legislation in the State, and fixed the limitation upon the legislative power so as to eradicate all the evils in that connection which had crept into our system of laws. With this end in view Article 4 was inserted,

which provides, "The legislative power, *subject to the limitations herein contained*, shall be vested in a Senate and a House of Representatives, to be styled 'The General Assembly of the State of Missouri,'" and then follow many specific limitations upon that power, but among them we find none in regard to the law of contempt. The judicial power granted to the courts is in these words: —

"The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, Circuit Courts, Criminal Courts, Probate Courts, County Courts and Municipal Corporation Courts."

Then the revision of the statutes in 1879 was made and the contempt statute went into it without the slightest change. In 1883 the case of *ex parte* Renshaw was decided by the Supreme Court. In this case Renshaw was ordered by the Circuit Court of Jackson County not to remove certain fixtures from a room named, which order he disobeyed. Afterwards the court ordered him to restore the fixtures, which he failed to do; whereupon the court fined him one hundred dollars for contempt, and ordered that he stand committed until the fine was paid, and fixtures restored. The Supreme Court, on appeal, cited sections 1055, 1056 and 1059, R. S. 1879, which are the same as sections 1616, 1617 and 1620, R. S. 1899, and treated them all as valid. The court held that under Section 1059, R. S.

1879 (Sec. 1620, R. S. 1899), the court had the power to imprison the defendant until he complied with the order of the court, but held the fine improperly imposed, saying: "*No fine for a criminal contempt can exceed fifty dollars*," *and the judgment of the court below was modified so as to release defendant from the fine* but that he be imprisoned until he should comply with the order of the court to restore the fixtures. Mr. Justice Sherwood concurred in the construction of the several sections of the statute, but held that Section 1056 R. S. 1879 (Section 1617, R. S. 1899), limiting the power of the court in the punishment of criminal contempt was an invasion of the judicial power, conferred on the courts by the Constitution. But the majority of the court, and the counsel in the case, did not raise or discuss the constitutionality of this statute, but the court, in most emphatic terms, recognized its validity and enforced its provisions. This case was, as to the extent of the fine, cited with approval, by the Supreme Court in ex parte Baenninghousen, 91 Mo. 305, and thus interpreted, the contempt statute went into the Revisions of 1889 and 1899. It may be added that the Circuit Courts for over sixty years, and the Court of Appeals for twenty-one years, have followed the contempt statutes, and recognized them as valid without question.

In the light of this historical sketch of the question in England and America I will now proceed to examine the main points made by

the Supreme Court in the Shepherd case which I combat.

I.

Jurisdiction to punish for contempt for the publication of an alleged libel was not conferred on this court by the Constitution of 1820.

Any principle of the common law, that was repugnant to the provisions of this Constitution, was never in force in this State. The same instrument that conferred the "judicial power" on the court also provided for freedom of speech and of the press, and that "in all prosecutions for libels, the truth thereof may be given in evidence, and the jury may determine the law and the facts under the direction of the court." Even without this provision, according to the final opinion of Lord Erskine, it is doubtful if the court would have had power, under the common law then in force in Missouri by virtue of the Act of 1816, to punish parties, as for a contempt, for libelous publications on the courts or their judges and we must determine what was intended by the insertion of this provision in the Bill of Rights, and in this discussion the history of the struggle for the crystallization of that principle into law first, and then into the Constitution, must be considered. Among the English-speaking people the word "prerogative" has always been hateful, and every attempt on the part of the government to punish for contempt of itself or a judge to punish for contempt of himself has always met the fiercest opposition, especially in our own country. This opposition has grown out of

the methods of exercising jurisdiction in such cases. It has been regarded by the people as an exercise of a kind of prerogative for the government itself to determine when its action was unduly criticised, and especially for a judge to decide whether his action was unduly held up to public animadversion. The people have, for one hundred and fifty years, held that, in such cases, there was too much of the personal, though partaking in a degree of the official, to justify the government on the one hand and the judge on the other becoming the jury in its or his own case. The government and the court, as entities, have no sentient existence, and it is only through their administrators they can be attacked, and when thus attacked the attack has a personal as well as an official phase, and no matter what the theory of such a proceeding may be, in the public mind there is and always has been and always will be an intuitive feeling that the maxim "no man should be a judge in his own cause" is violated when the government undertakes to prevent any one from criticising itself, or a judge brings a citizen before him for trial on the process of attachment for contempt of the court over which he presides.

Thus the Alien and Sedition Laws of 1798 aroused the fiercest opposition, and the trials, under these laws, on account of this opposition, had a profound influence on the growth and development of our institutions. And thus the trials for contempt of court by newspaper publications have given rise to some of

the fiercest controversies, which have left their lasting impression upon our laws and civilization. But in waging these conflicts the people have never fought for unrestrained criticism and license, but the battle on their part has been waged along other lines. The battle has been about the manner, rather than the matter of the jurisdiction attempted to be exercised. Those who opposed the Alien and Sedition laws did not deny the right of the government to protect itself against unjust and pernicious attacks, but they did deny the right of the national government to pass and enforce such laws, claiming that it was the sole province of the States to provide for vindication in such cases. Those who opposed proceedings, based on attachment for contempt of court for newspaper publications, did not deny that courts ought to be protected against unjust and malicious criticism, but they did deny the propriety, if not the right of the judge to try any issue, in which his personality must, of necessity, more or less enter, and which, they felt, can but influence his decision. This objection, however, applies only where the contempt proceeding is for criticism of the judge by print, writing or picture, and does not apply to the enforcement of the orders of the court, for in this the personality of the judge does not enter in the slightest degree, and hence, personal bias in such cases can have no appreciable influence over the decision of a just judge. Lord Erskine, at the close of his great career,

gave it as his opinion that there ought to be a jury trial when a person is charged with libeling a court or judge; and Lord Campbell, one of the Chief Justices of England, in a note to the case of Rex v. Almonds Wilm. Op. 243, 3rd Volume of his Lives of the Lord Chief Justices, 190, says, "In consequence of the resignation of Sir Fletcher Norton, who as Attorney-General had made the motion, it (the Almond case for contempt) was dropped after cause shown while the court was considering its judgment; and although there can be no doubt as to the power to proceed by attachment in such a case, — if a prosecution for a libel on judges be necessary, — the preferable course is to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties." Lord Campbell here but expresses the universal opinion of mankind. This feeling of the people had been intensified and made absolutely predominant by the Revolutionary struggle in this country, and by the contest waged by the people against the exercise of all forms of prerogative and arbitrary power by governmental agencies, and in an emphatic degree had the opposition to a press censorship been made strong and robust, so that when in 1820, thirty-seven years after the close of the war of Independence, twenty years after the end of the great struggle against the Alien and Sedition laws, and sixteen years after the Senate

of Pennsylvania by a vote of thirteen to eleven for the conviction of Judge Shippen (who had grown gray in the service of his country), for a high crime in punishing Passamore for a publication in a newspaper; with the memories of the struggle of the half century preceding that time in England and America for the rights of men fresh in their minds, the people of this State came to write their first Constitution, they seemed to be determined on one thing, and that was, to abolish press censorship for once and all, and place the freedom of speech and of the press on an enduring basis. And they wrote in their Bill of Rights this stalwart language: "That the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may think, write and print on any subject, being responsible for the abuse of that liberty." And in order to specify how, and before what tribunal such a responsibility should be determined, it was added: "And in all prosecutions for libel the truth thereof may be given in evidence, and the jury may determine the law and the fact, under the direction of the court."

Was that clear and vigorous language intended by the framers of that Constitution to be a "limitation of the judicial power" of the English courts, as defined by Blackstone before our Declaration of Independence was penned? The common law of England was in force here only by virtue of a statute of the Territorial legislature passed in 1816, and that

law was in force so far, and only so far as it was not *repugnant to any statute of the Territory*, and by Section 2 of the schedule it was declared, "That all laws now in force in the Territory of Missouri, which are not repugnant to this Constitution shall remain in force until they shall expire by their own limitation, or *be altered or repealed by the General Assembly*." Do the words "the judicial power," as used in that Constitution, include the power of the courts to punish by the process of attachment for contempt, for an alleged libel upon the court, the judges, the parties to any suit, or the officers of the court; or is that common law rule repugnant to the Constitution? I have not a shadow of a doubt but that it is; that the framers of the Constitution of 1820 and the people intended to prohibit the exercise of such a power, and thought they had done so. They never dreamed that Blackstone and the English judges would be quoted as authority for the courts to bring before them, and try without indictment or information, and without the intervention of a jury, a citizen for criticising the courts in the press, even though such criticism might be libelous, thus becoming judges in their own causes, and compelling parties to give evidence against themselves, and becoming the triers not only of the law, but also of the fact in a libel case. I feel sure that at that time if the exercise of such a power had been attempted by the courts, it would have been as fiercely resisted as the exercise of such a

power by Chief Justices McKean and Shippen were resisted in Pennsylvania only a few years before. And the fact that no Missouri judge, in the early days of the republic, attempted to exercise such a power in such a case, though many occasions and provocations for its exercise were not wanting, shows that not only the people, but the Bench and Bar then did not claim such jurisdiction for the courts. But this view rests not alone upon theory. There is authority for it.

In 1875 the Supreme Court of Illinois had this very question before it in Storey v. People, 79 Ill. 45. The Chicago *Times* had reflected upon the action of the grand jury in finding an indictment against the editor of that paper and for this he was attached for contempt of the court. After referring to the doctrine laid down by Blackstone, the Supreme Court said: "But the law in relation to contempt has never been held in any case decided by this court to be so indefinitely broad as it is thus stated by Blackstone. Our Constitution and statutes certainly affect this question, and it is only in determining *precisely* how far they do so, that we have any difficulty. Courts, however, possess certain common law powers, subject to modifications that may have been imposed *by our Constitution and statutes*, among which is included that of punishing for contempt." The court goes on to say that the law of libel at common law left the jury to determine whether the defendant was guilty of the publication

alone; but the question, whether the publication was libelous, was for the court, and it was not permissible to show by evidence that the publication was true, or to show the motives of the publisher, and under the common law, therefore, whether the party charged was tried by a jury or proceeded against summarily as for contempt, the only question of fact was whether he was guilty of the publication, and then it was for the court to say whether the publication was libelous or not. The court continuing along this line of argument, added, "In this State (Illinois) however, our own Constitution guarantees that every person may fully speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, civil or criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense. This language, plain and explicit as it is, cannot be held to have no application to the courts, or those by whom they are conducted." The court quotes with approval the following language from the Stewart case, 3 Scam. 402 (also an Illinois case): "If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the county." The basis for the attachment for contempt in the Stewart case was a severe reflection on a judge in a newspaper during the pendency of a murder trial. In the Storey case the court concluded as follows: "When it is conceded that the

guaranty of this clause (freedom of press) of the Constitution extends to *words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defense which can only be properly tried by jury, and which the judge of a court, especially if he himself, is the subject of the publication, is unfitted to try.*"

Upon reason and authority, therefore, I conclude that the common law power of the judiciary, as it existed in England prior to our Revolutionary struggle, to try without the intervention of a jury, and punish, as for a contempt, a person, for a libelous publication upon the court, judges, parties, witnesses or officers, was not in force in Missouri after the adoption of the Constitution of 1820.

II.

The words, "The Legislative Power" as used in the Constitution of 1820 authorized the enactment of the contempt statute.

At this point, it behooves me to examine the rule our own Supreme Court has laid down and enforced by which it has always determined whether a statute be constitutional or not. That court, in State v. Able, 65 Mo. 357, very clearly sets out the rule which should govern the court in determining the constitutionality of a statute in this language: "It may be observed as preliminary to the consideration of this subject that when we are asked to declare an act of the legislature unconstitutional, which has been passed with all

the forms and ceremonies required to give it force, the question must be approached with great caution, and considered with the utmost care and deliberation. The nullity and invalidity of such a law must appear beyond a reasonable doubt before we can pronounce it void. It has been held by this court that no rule is better established than that acts of the legislature are presumed to be constitutional, and till the contrary plainly appears, and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In case of doubt, every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the act (43 Mo. 385; 48 Mo. 468). It has been well said in the case of Brown v. Buzan (24 Ind. 197) 'that the legislature is peculiarly under the control of the popular will. It is liable to be changed at short intervals by elections. Its errors, therefore, can be quickly cured. The courts are more remote from the people. If we, by following our doubts in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court might err in denying the rightful authority of the law-making power, we would chain that authority for a long period at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either

department of the government may slightly overstep the limits of its constitutional power, it should be that one, whose official life would soonest end. It has the least motives to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute, unless its conflict with the Constitution is clear. The judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself, as honest a desire to obey the Constitution, and also a high capacity to judge of its meaning.'" This case has been quoted by the Supreme Court many times since with approval, and as late as 1894, in the Copeland case, 126 Mo. 435. The language here is so explicit and clear that nothing can be added.

The rule of construction of the powers of a State legislature is the reverse of that applied to Congress. The latter can exercise no power except that which is delegated to it, while a State legislature is clothed with all legislative power not denied to it in the State and national constitutions. In England the Parliament is said to be omnipotent in its legislative capacity. It can dethrone and even behead a king, and set up another form of government, as it did in 1640–50, or dethrone the legitimate reigning monarch and clothe some one else with the executive power, as it did in 1688–9. It can abolish the courts, and reorganize the judiciary upon any basis it sees proper, as was done in many

acts, especially in the Judiciary Act of 1873. It even has judicial powers, and has often exercised such powers in passing bills of attainder and the like. It has absolute power to make and unmake all laws of the kingdom. The American Colonies claimed the same power for their assemblies, as representatives of their will, and if we appeal to the common law for a definition of "the legislative power," as it existed in 1820, we will find much more latitude for our legislative department than can be found for the judicial. Blackstone, speaking of this power, says: "The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. * * * It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the Constitution of these kingdoms." But the legislative power, under State constitutions, is not co-extensive with that of Parliament, but is limited in several respects by the State Constitutions and the National Constitution. But within these limitations, the legislative power of a State legislature is as unbounded as that of Parliament. Now

let us see if there is any limitation of the "legislative power" over the subject of contempt of court contained in the Constitution, either in direct terms or by implication. Mr. Justice Marshall, in his opinion, bases his argument that the legislative power was so limited, solely and alone upon the article of the Constitution which is the same now as it was in the Constitution of 1820, distributing the powers of government among the three departments of that government. That article established the three co-ordinate branches, the legislative, executive and judicial, upon which it confers "the powers of government," "each of which shall be confided to a separate magistracy;" and *no person or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others*, except in the instances hereinafter expressly directed or permitted." The italicized sentence is the sole foundation upon which the court bases its judgment in the Shepherd case.

Now, in all candor, I ask what judicial power, which was confided to the courts, did the legislature exercise in the enactment of the contempt statute? To say that in that enactment "judicial power" was exercised by the legislature would be a perversion of the meaning of that term as construed among all men. Webster defines "judicial" thus: "1st. Pertaining or appropriate to courts or

to a judge thereof, as 'judicial power,' 'a judicial mind.' 2d. Practiced or employed in the administration of justice, as 'a judicial proceeding.' 3d. Proceeding from a court of justice, a judicial determination or order of a court, as 'a judicial sale.' "

The judicial power, as exercised in England and the United States, and in all civilized countries, is that power which can be exercised by courts only in a specific case with named parties properly before it, according to the forms of law, and when the points presented in such a specific case are disposed of, the power, for further action, ceases. The courts cannot, and never did act on an abstract question, except some of the constitutions of the American States provide for the submission of such questions by the executive and legislative branches of the government to the courts for their opinions, and our Constitution of 1865 so provided; but we omitted that provision in the Constitution of 1875, so that in our State the courts are not clothed with the judicial power to act, unless a specific party presents a specific point for judgment, according to the forms prescribed by law. No one will pretend that a party, not even the governor, or legislature, or both combined, could call into exercise the judicial power of a court by demanding an opinion on an abstract question. To call into exercise such a power there must be a concrete case before the court, and in disposing of it the court exercises judgment and discretion and renders judgment.

All the courts have gone so far in limiting the exercise of judicial power that when they dispose of the questions presented by the records in given cases, any further action or opinion is universally regarded and treated as *obiter dictum*, that is, not judicial, and as the personal expression of the judge, and if the court acts in a case not properly before it according to the forms of law, such act will be set aside, and in many cases treated as absolutely void *ab initio*, and not binding on the court in collateral proceedings in regard to the same matter. But we are not left to our own meaning on this proposition. Cooley (Con. Lim. 110) on the subject of legislative and judicial power says, "The legislative power we understand to be the authority to make laws under the constitution, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes which the legislature has prescribed, and the difference between the departments undoubtedly is that the legislative *makes*, the executive *executes*, and the judiciary *construes* the law. And it is said that that which distinguishes a judicial from a legislative act is that one is a determination of what the existing law is, in relation to some *existing thing already done or happened*, while the other is a predetermination of what these laws shall be for the regulation of future cases, falling under its provisions. And in another case it is said, 'The legislative power applies only to

the making of laws.' On the other hand to adjudicate upon and protect the rights of individual citizens, and to that end to construe and apply the laws is the peculiar province of the judicial department. The court decides upon the legality of claims and conduct, and the legislative makes rules upon which, in connection with the constitution, those decisions should be founded. It is the province of the judges to determine what is the law upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore to compare the claims of parties with the law of the land before established is, in its nature, a judicial act; but to do the last — to pass *new* rules for the regulation of new controversies is, in its nature, a legislative act."

But the legislature might violate this provision of the constitution in another way. It might have undertaken to confer "the judicial power" on some officer other than the courts. If the legislature had provided that the courts should not decide contempt cases at all, or only a certain class of them, and had conferred such power on the clerk or sheriff of the court, or on the governor or other executive officer of the State, such provision would have been utterly void *as authorizing* the exercise by one department of a power that properly belongs to another. But no such thing was attempted. The very first sentence of the contempt statute declares that "Every court of record shall have power to

punish, as for criminal contempt, persons guilty of the following acts, and no other." Is that not unquestionably a rule of civil conduct prescribed by the supreme power in the State?

But it is claimed the legislature had no right to insert in that statute the words "no other," and thus deprive the courts of a part of their former jurisdiction. But it cannot be maintained that in inserting those words it exercised the judicial power because the act lacked all the elements of a judicial act, and of course if it had no power to so insert them the deprivation of power must be found in some other provision of the Constitution. No other has ever been pointed out, nor can it be. But these restrictive words, taken in connection with the whole contempt statute, and other statutes, do not deprive the courts of any judicial power or jurisdiction whatever. When the courts try a case of libel upon the court upon an information or indictment, or at the civil suit of the judge or judges for damages, and a jury is called in to aid in the trial, the courts exercise the "judicial power" as fully as if they acted without a jury, and those remedies are left to the courts to the fullest extent possible. Hence the only thing that can be said about the classes of contempt, not embraced within the statute, is, that the act simply takes away from the courts one method of procedure, but leaves two other methods — a criminal prosecution in the ordinary course, and a civil action for dam-

ages, by which they are left free to exercise the "judicial power" to protect society against, and redress private injuries for libelous publications. So I conclude that the legislature, in the enactment of the contempt statute, did not itself exercise the "judicial power," which properly belongs to the courts, nor did it deprive the courts of any of its judicial power, and especially did not confer nor attempt to confer judicial power on any person or collection of persons other than the courts.

There is another view that may be taken of this question, and that is the common law, which is made the basis by the court, upon which the judgment in the Shepherd case rests, was not a part of our birthright, but is here, and is kept here only by statutory enactment. In the act of the Territorial legislature of 1816, introducing the common law, and which was in force when the Constitution of 1820 was adopted, it was specifically provided that law should prevail only until the same was modified or repealed by the legislature. In all the revisions of the statutes since 1820 to this time, the statute introducing the common law introduced no rule of that law that is repugnant to or inconsistent with the statute laws in force for the time being. That provision gave the legislature a continuing power to change the common law at will, which has frequently been done, which power the Supreme Court, in a long line of decisions, has uniformly recognized and upheld. It is

claimed now, however, that the legislature had no power in 1835, nor has it the power at this time to change the common law of contempt as laid down by Blackstone a hundred and fifty years ago. According to that theory, the State of Missouri is in as bad a predicament as Sinbad the Sailor with the Old Man of the Sea on his back. The Territorial legislature in 1816, and all the legislatures in the State since, in introducing that law, reserved the right to repeal or modify it at will, and besides that, the people in the Constitution of 1820 declared that: "All laws now in force in the territory of Missouri, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the General Assembly." Here the General Assembly is given specific authority to alter or modify all laws that were in force at the time the Constitution was adopted, and it seems plain to me the legislature, in enacting the contempt statute, exercised the power given to it by the Constitution, and the power it had reserved the right to exercise. On this point the Supreme Court in the Shepherd case seems to occupy an illogical position. The common law rule of contempt for a libel upon the court *is repugnant to a statute of the State legislature*, and yet that rule of the common law is invoked by the court to prove that *this statute is repugnant to the Constitution.* In other words it is held that the contempt statute is unconstitutional not

because it contravenes any specific provision of the Constitution, but because it contravenes a rule of the common law, which rule, it is universally conceded, could be made a rule of civil conduct in Missouri by the General Assembly, and by that alone, and could, at any time be abrogated by the same power.

In 1845, 1855, and 1865 the contempt act was re-enacted, and thus the law-making power claimed and exercised the power to enact that statute for a period of forty years, up to the adoption of the Constitution of 1875, and this construction by the legislature of its own powers must be considered by the courts, as will be shown more fully hereafter.

If the legislature had no power to prescribe a form of proceeding in the case of contempt, and that rule should be applied generally, two thirds of our statutes would be held unconstitutional. In 1820 the common law system of pleading and practice was in force, and the judge could orally comment to the jury on the facts as well as the law of the case, and the courts were confined to certain forms of action; but in 1849 by a sweeping act, the General Assembly abolished all common law forms, and prescribed a code of practice and pleading, and required the courts to instruct juries in writing alone; and in following this limitation of the judicial power, our Supreme Court became so technical in enforcing it, that the *Nisi Prius* judges soliloquized thus: "To talk or not to talk in the presence of a jury — that is the question;

whether it is better to say nothing or to talk gives us pause," and only a short time ago the Supreme Court reversed a case because the trial judge said too much in the presence of the jury, and this year the lower courts have been reversed in numerous cases on the ground that the information in these cases had not been verified by affidavit, not as required by the Constitution, *but as required by a statute*, by which men, charged with grave crimes, have been granted new trials, upon a *technical point required by the statute*, which could not, and did not, affect the merits on the trial of the cases in the slightest degree.

The legislature has not only changed the civil code of practice, but it has, since 1820, invaded the domain of the criminal law, and made many radical changes in the administration of that law.

It may be asked how it is that the legislature has the power to take away from the courts the judicial power they once exercised in commenting orally to juries on the facts of cases, and can change the forms in which instructions to juries on questions of law shall be given, and to abolish the old forms of civil action and of criminal proceedings, and enact an entirely new code, and not have the power to change the practice in contempt cases, especially when that change is to prevent the courts from exercising a jurisdiction in cases where they may be supposed to have a personal interest, and is intended to be in support

of the freedom of speech and the press, and of the right of trial by jury in a class of cases that it required a century of the fiercest contest by the people to establish? Again the legislature, after the adoption of the Constitution of 1820, changed the rules of evidence, and the competency of witnesses, created new causes of action, new crimes, took away some old actions, and declared some acts innocent that were formerly criminal, and changed the rules of property and of contracts, especially in regard to married women. These changes have stricken the shackles from our mothers, wives and daughters, so that to-day they are as free to own property and to contract in regard to it as men are. The legislative department of the government has had a free hand, and its decrees therein have been upheld in these respects. Can that power make these changes in these departments of human rights and activities and not possess the power to provide safeguards for one of the fundamental principles of free government — the freedom of the press, and the right of trial by jury in case that freedom is abused, and to prevent the exercise of a power the extent of which is measured alone by the discretion of the party exercising it, both as to the scope of the jurisdiction and the extent of the punishment to be inflicted? There can be but one answer to this question.

III.

The judicial power conferred on the courts by the Constitution of 1875 does not authorize them to exercise jurisdiction to punish, by the process of attachment for contempt, any one for an alleged libel upon the courts, their judges, officers, or the parties in a case.

The arguments hereinbefore presented to show that the power to punish for libel upon the courts under the Constitution of 1820 in the absence of legislation on the subject apply with equal force to this particular power under the Constitution of 1875, and this point will not be further elaborated here.

IV.

The Constitution of 1875 confers power on the General Assembly of this State to enact the Contempt Statute.

All the arguments hereinbefore made in favor of the existence of this power in the legislative department under the Constitution of 1820 apply with equal force in favor of the same power under the Constitution of 1875, and are here invoked, and the additional reasons and arguments to prove the existence of that power under the Constitution of 1875 will now be presented.

If ever a body of men assembled with a full and fixed purpose to eradicate from the body politic all the evils that had, at that time, been found to have crept into it, that body was the Constitutional Convention of 1875. There had been for ten years, prior to the assembling of that Convention, a general discussion of constitutional law, by the people, the lawyers, and the courts in the United States, that hav-

ing been the period of the reconstruction of the governments of the seceding States, and especially was that discussion in Missouri during that same period, not only general, but heated, and oftentimes bitter. The wisdom of ages on constitutional principles was again examined in all its bearings and phases, and the Convention of 1875, enlightened by this widespread agitation, met to restate the fundamental principles by which the State government, in all its departments, should be restrained and guided. Especially was this Convention deeply imbued with the idea that more limitations should be imposed on the three co-ordinate branches of the government than had theretofore existed, in order to conform to the new and awakened opinions of that period. That the members of that convention must be presumed to have been familiar with the history and evolution of the fundamental principles of liberty and of government, and especially with the constitutional history of Missouri, and of the exercise of the legislative and judicial powers since 1820, will be conceded by all.

The Supreme Court in Ry. Co. v. Brick Co., 85 Mo. 307, speaking on this subject said, "It would be doing violence to all known rules of interpretation to assume that those who framed, and those who by their votes adopted our Constitution (of 1875), were actuated by no intelligent purpose in that behalf. On the contrary it must be assumed that they were familiar with the vicissitudes

incident to condemnation proceedings, and with the statutory provisions relative thereto." If they must be presumed to be familiar with the practice in proceedings that affected private rights only, how much stronger must be the presumption that they were familiar with the constitutional, legislative and judicial history of the evolution of the fundamental principles of free government.

Under these conditions, the Convention of 1875 went to work. It distributed the powers of government among the departments, and declared the law of free speech, a free press and libel in the identical language used on the same subject in the Constitution of 1820. The same general language is also used in the grant of legislative power as was in the previous Constitution, but the specific limitations upon that power are much more numerous and important than had previously existed; but nowhere among them is to be found any limitation of the legislative power over the subject of contempt, and the presumption is that the framers of the Constitution intended that power should remain in the future as it had existed in the past. The legislature, forty years before 1875, enacted a statute, restricting the jurisdiction of the courts, in contempt proceedings, to certain cases, and that statute was placed under the chapter of the statutes defining their judicial powers and duties. This statute was re-enacted in 1845, and went into the revision of that year, under the same

head. Then came the construction of this statute by the Supreme Court in the Harrison case in 1847, and with this construction, the same statute went into the revisions of 1855 and 1865 under the same head; and how can the conclusion be avoided that when the convention granted the legislative and judicial powers in the same general terms as in the Constitutions of 1820 and 1865, with certain specified limitations, it intended to confer these powers, within these limitations, as they had been exercised by the legislative and judicial departments and meant to use the words "the judicial power" as they had been defined and limited by legislative enactment, and to use the words "the legislative power" in the sense that the General Assembly had construed and exercised it in the past? The legislative definition of the judicial power over the subject of contempt had existed for forty years, and over the punishment to be inflicted in such cases for fifty years, and during all that long period, the people, Bench, and Bar had acquiesced in that definition and limitation, and it seems obvious that if the Convention had intended to reject that definition and limitation, it would have said so in plain language, and would have inserted in the Constitution a limitation of the legislative power over contempt proceedings, but it did nothing of that kind, but used the same general language in the grant of legislative and judicial power that was found in the Constitution of 1820.

But, again, there is another reason why it

must be assumed that the framers of the Constitution of 1875 did not intend by the grant of the judicial power to the courts, to deprive the legislature of power over contempts, and that is, the new courts created by that Constitution. The court in the Shepherd case concedes that it is only a constitutional court that is not subject to legislative control in contempt proceedings. By the Constitution of 1820 the only courts recognized were the Supreme Court, the Chancellor, and Circuit Courts, so that only these courts, according to the decision in the Shepherd case, are beyond the control of the legislative power, but by the Constitution of 1875, "Probate Courts, County Courts, and Municipal Corporation Courts" are recognized, so that if the legislature has no control over the practice in contempt cases, any citizen may be attached by a probate judge, a county court, or a police judge and tried and fined, or imprisoned and this without limit (except the discretion of the court), without the intervention of a jury, for any publication that such court or judge might deem contempt; and I submit that it cannot be conceived that the framers of the Constitution intended to clothe any of the courts, especially these subordinate courts with such an unrestrained and unrestrainable power.

But again the Constitution of 1875 provides that "All laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in force until altered or re-

pealed by the General Assembly. The provisions of all statutes, which are inconsistent with this Constitution, shall cease upon its adoption." The General Assembly, when it came to revise the laws in 1879, was necessarily required to examine all the laws, to determine whether they were repugnant to the Constitution, adopted since the last revision, and it deliberately put the contempt statute in the revision of that year, without the slightest change, and continued it in force so far as it could do so. Hence we have the opinion of the legislative and executive departments, with Governor Phelps as governor in 1879, that the statute in question is Constitutional. Then in 1883 the Crenshaw case was decided by the Supreme Court, and afterwards with this indorsement of the contempt statute, by all three of the departments of the State government, by the legislative and executive in 1879, and by the judicial in the Crenshaw case in 1883, that statute went into the revisions of 1889 and 1899, thus getting the indorsement, as to its validity of two more legislatures, and two more governors.

This long continued construction of, and acquiescence in the exercise of this legislative power by the people, the lawyers, judges, governors and legislatures, are reasons enough why this power ought to be upheld now, even if it were originally doubtful. This is the rule laid down by Sutherland (Stat. Con., Sec. 397): "A contemporaneous construction of a statute is that which it receives soon after its enactment. This, after the lapse of

time, without change of that construction by legislative or judicial decision, has been declared to be, generally, the best construction. It gives the sense of the community as to the terms made use of by the legislature." Hence in 1903, when the Shepherd case was up for decision, the Supreme Court found a statute, denying jurisdiction to it in the subject-matter of that case, which had been in force for sixty-eight years, and another denying jurisdiction in such a case to impose a greater fine than one hundred dollars, which had been in force for seventy-eight years, and during those long periods there had been universal acquiescence in these statutes by the people, by seven General Assemblies, and seven governors, by two Constitutional Conventions, and three times by the Supreme Court, in the Harrison case in 1847, in the Rose case in 1866, and in the Crenshaw case in 1883. Notwithstanding all this, that ancient statute was set aside in order for the court to acquire jurisdiction in the Shepherd case, not for the vindication, but the deprivation of a Constitutional right of a citizen — the right of trial by jury, which has been deemed by the Anglo-Saxon people for centuries as the great bulwark of liberty.

V.

The Contempt Statute is not void upon the alleged ground that it deprives the courts of an essential attribute without which they cannot exist.

THE LAW OF NECESSITY.

The courts base their power to punish for contempt, chiefly upon the law of necessity,

which is the law of self-defense. To some extent that may be true. That the courts should have the power, by summary process, at the time to keep the peace within their own precincts; to protect themselves and the parties concerned, in the business before them, from insult and interference, and enforce their orders and judgments, is too axiomatic to admit of proof by argument; but acts or words, done or said, or published away from the courts, and not in their presence, stand upon different grounds entirely, *because the law of necessity* does not apply in these, there being other more appropriate remedies for any wrong growing out of them.

It is submitted that the law of necessity cannot be invoked in support of the power of the courts to try and punish for contempt any one for the publication of a libel upon them or for other acts not done in their presence. An abstract theory, though in appearance it may be most plausible and beautiful, is sometimes flatly contradicted by experience and the facts of history, and that is the case with the theory upon which this power is made to rest by its advocates. It is asserted that this power is an *essential* attribute of *all* courts, and immediately this is qualified by the statement that it is an essential attribute of *constitutional* courts only — that a statutory court may be deprived of this essential attribute, and yet continue to exist as a court. This is the rule generally applied by the courts. This was done by the Supreme Court of the United

States in *Ex Parte* Robinson, 19 Wall. 505; in the Frew case, 24 W. Va. 416; in the Shepherd case, and many others. So that it seems that the law of necessity is the support of some courts, and some courts have to stand without that law. The reason for such a distinction is not apparent to the writer. To my mind, that so-called law of necessity is no law of necessity at all, for, if it were, *no* court could exist without it.

But this is not all. This theory of the law of necessity, as applicable to the punishment for contempt for newspaper publications, is flatly contradicted by the facts of history. The Supreme Court of the United States has never exercised, or attempted to exercise such a power, though it has, at times, for one hundred years or more, been vilified, abused and libeled in an outrageous manner. It has been libelously criticised by the public press for its decisions in the National Bank cases, the Dartmouth College case, the Dred Scott case, the Reconstruction cases, the Legal Tender cases, and we all remember the vituperative and libelous attacks, made by the press and many public speakers, upon that high tribunal for its decisions in the Income Tax and Insular cases; and yet the court remained silent and passive; but it still exists in all its vigor. That court, in 1873, in *Ex Parte* Robinson, decided that under the Act of Congress of March 2, 1831, the courts, inferior to the Supreme Court of the United States, have no jurisdiction in a contempt

proceeding for acts not committed in their presence; and yet there are no courts of the States of this Union that stand higher or are more respected than the United States Courts of Appeals, the United States Circuit Courts, and the United States District Courts. The members of the Supreme Court often sit in some of these, and aid in the administration of the law in the trial of causes. These courts are absolutely, so far as their power to punish as for a contempt a newspaper publication, at the mercy of the slanderers and libelers of this country, which our Supreme Court stands so much in dread of. And yet those courts continue to exist as courts. And our State Supreme Court, the Courts of Appeals, and the Circuit Courts never exercised this extraordinary prerogative prior to 1903, and yet they continued to exist. The same may be said of ninety-nine per cent of all the courts in our country. Lords Erskine and Campbell did not think this power essential to a court.

Speaking upon this very point, the Supreme Court of Illinois, in the Storey case, *supra*, quoting from a former decision of the same court, said: "It does not seem necessary for the protection of courts in the exercise of their judicial power, that this one (contempt for libelous publication), so liable to abuse should also be conceded to them. It may be so frequently exercised as to destroy that moral influence, which is their best possession, until finally the administration of justice is brought into disrepute. Respect for

courts cannot be compelled. It is the voluntary tribute of the public to worth, virtue and intelligence, and while they are found upon the judgment seat so long, and no longer, will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the county."

The Supreme Court of Wisconsin, speaking on the same subject, in State ex rel. v. Court, 44 L. R. A. 554, said, "Is it necessary that a court should possess this power? We feel bound to hold that, considering the rights of the citizen just referred to, *no such power as this is necessary for the due administration of justice.* It may be fully admitted that under the common law as administered in England, the mere writing contemptuously of a superior court of justice has been declared a constructive contempt, 4 Bl. Com. 285. We, however, adopted no part of the common law which was inconsistent with our Constitution (Cons. Wis. Schedule, Sec. 131), and it seems clear to us that so extreme a power is inconsistent with and would materially impair the Constitutional right of free speech and free print."

To the same effect is the opinion of the court in Mississippi, in *Ex Parte* Hickey, 4 Smedes & M. 751, and it has been the firm conviction of the people of this country for over a hundred years that this power is not necessary, but that it is a power, so arbitrary

and so liable to abuse, that it ought not to be intrusted to the court, but that cases, involving the abuse of the freedom of speech and of the press, ought to be tried by an impartial jury before courts that have and can have no personal interest in the result. Hence this power in this respect, not being based on the law of necessity, can be taken away from, or not conferred on the courts at the will of the legislature. Whether the power to protect themselves from insult, and keep the peace in their own precincts, and enforce their own judgments can be taken away from the courts, or given to some other judicial tribunal, has not arisen in this country yet, for no legislature has ever up to this time attempted to go that far, and until such an attempt is made, so improbable a contingency need not enter into the discussion.

Our contempt statute not only recognizes, but, in terms, confers the power on the courts to punish for contempts committed in their presence, and for refusing to obey the process or orders of the court, and beyond these the law of necessity, if it exist at all, does not extend.

VI.

The adjudged cases do not support the judgment in the Shepherd case.

I might very well leave the question upon these points, already made, believing that it has been conclusively shown that the power, claimed by the court in this case, does not exist in Missouri, no matter what the rule

may be in other jurisdictions, but I propose to give a brief review of the cases on this question. Out of the forty-five States, the courts in only two, Arkansas and West Virginia, have set aside statutes in order to obtain jurisdiction to punish as for a contempt, a libelous newspaper publication. The Arkansas decision was in 1855, State v. Morrill, 16 Arkansas, 384, and the West Virginia decision (State v. Frew, 24 W. Va. 416) in 1884; and two other courts, Georgia, in Bradley v. State, 50 L. R. A. 691, and Virginia, in Com. v. Carter, 45 L. R. A. 310, have held that the courts' inherent power to punish contempts cannot be limited by the legislative power, but these cases did not involve newspaper publications. In the Carter case, Carter, an attorney of the court, had induced a witness, by falsehood, to remain away from court, in order that he might get a continuance, and in order to punish Carter, the court held an act of the Virginia General Assembly, passed in 1897, giving the accused, in an indirect contempt case, the right of trial by jury, unconstitutional. In the Bradley case, the Supreme Court of Georgia not only set aside a statute, but the Constitution also, in order to get jurisdiction to punish Bradley for contempt in proposing to corrupt a jury in a pending case. In these last two cases the courts exercised the power to punish for a contempt, in defiance of statutes, to prevent corrupt practices in cases pending before the courts, and in these cases the courts or the

judges had no personal interest, and the acts of contempt were of such a nature, when proved, that there could be no defense or excuse on the part of the accused for them.

In the Frew case, the accused set about deliberately, either to influence the Supreme Court of West Virginia in the disposition of a cause pending before that court, in which he was personally interested, or else to bring the court into contempt for not deciding in his favor, and the publications were continued for a long time, and repeated, in order to carry out his purposes. This leaves the Morrill case as the only one exactly like the Shepherd case, except that in the former, the case, for the criticism of which he was attached, had been finally disposed of, while in the Shepherd case a motion for rehearing in Oglesby v. Railroad Company was still pending when Shepherd published the objectionable article. But Mr. Shepherd alleged that he did not know this, but had supposed the case was finally disposed of when it was reversed without being remanded. The facts in the Frew, Bradley and Carter cases are given not for the purpose of justifying the assumption of jurisdiction by the courts of Virginia, West Virginia and Georgia in the cases named, for if they had no jurisdiction to act, it makes no difference how aggravated the cases were. The courts in these four States have gone farther than the courts in any other State, and they *stand alone* in holding contempt statutes, containing nega-

tive, or restrictive words unconstitutional in order to exercise this extraordinary power. In these cases the question of the unconstitutionality of the statute was squarely presented by the record, and decided by the courts.

But our court in the Shepherd case went farther than these courts. Our court says: "The law is well settled, both *in England* and America that the legislature has no power to *take away*, *abridge*, *impair*, *limit or regulate*, the power of courts of record to punish for contempt." This is a most sweeping generalization of this rule, and it cuts up, by the roots, our whole contempt statute, and leaves the courts free to determine, at their discretion, their own jurisdiction, and the extent of the punishment they may inflict in both direct and constructive contempts. When the court says this rule is well settled in England, it must be assumed that it meant the English authorities settled it so far as an American legislature is concerned; because it is inconceivable that any court would assert that the English legislature, the Parliament, has no such power. No English jurist ever asserted any such proposition. Nor do any of the American authorities, cited by the court for this rule, sustain the broad proposition laid down by the court in its entirety. The courts of Arkansas, West Virginia, Virginia and Georgia, in the cases cited, while denying the power of the legislature to take away from the courts their *inherent* and *es-*

sential attributes, concede that the legislature may *regulate* the exercise of the power to punish for contempt, and in the other cases cited by the court from the reports of Kentucky, Connecticut, Illinois, Indiana, California, Colorado, Michigan, Nebraska and Ohio, the question of this legislative power was not involved, for in all of them the courts decided that the legislatures, in those States, had not attempted to restrict, by negative words, the power of the courts in the punishment of contempt, except possibly as to the extent of the punishment, that might be inflicted, and in this respect they sustained the statutes. It is true the courts in some of those cases took excursions into fields outside of the record, and in some of them uttered *dicta* of an extreme nature about the *inherent* and *essential* powers of courts in general, but none of them went so far, in these extra-judicial comments, as our court has in the extract above quoted, and in many of these the power of the legislature to limit the jurisdiction of courts in contempt cases, and to prescribe rules of practice therein, was distinctly sustained (see page 78, *post*).

The courts speak of their *inherent* powers, apparently implying that aside from the provisions of the constitutions or statutes creating them, they possess some powers derived in some other way and from some other source. This is misleading. The American courts, created by the constitutions of the several States, have *no power or jurisdiction*

except such as is confided to them by such constitutions or statutes. The courts are uniformly clothed with the judicial power in substantially the same language as that used in the Missouri constitution and they must look to these words alone for their entire jurisdiction. Outside of this grant, couched in this language, they have no power to go. If the power to punish for all classes of contempts is included in these words, the courts can exercise such power, otherwise not. So it is not strictly correct to say that the courts have *inherent* powers; they have no powers, except such as are *granted* by the sovereignty creating them.

The judicial power confided to the courts does not remain the same for all time. It may be enlarged or diminished by the law-making power as the exigencies of government and administration may demand. The only limitation in America, upon the legislative power in the grant of the judicial power to the courts, is that this power, whatever it be at any given time, must be exercised by the courts and cannot be conferred on either of the other departments of government. If the legislatures of our States have no power to change and regulate the jurisdiction of the courts and no power to define the judicial power that shall be exercised by them, then, as has been shown above, progress in government and administration is impossible. The judicial power, confided to the courts, would, on such assumption, have to remain as it ex-

isted at the time it is conferred until it is changed by a constitutional amendment though the forms of procedure and the rules of personal and property rights may have become entirely inconsistent with the conceptions of right and wrong in society. Such a theory is not sustained by sound reason nor by experience. In all the States from the beginning the legislatures have, by statutes, inaugurated law reforms, not only by changing the rules of pleading and practice in the courts but by introducing new laws creating new rights, and modifying old ones, thus changing the judicial power that the courts exercise, and the courts themselves with the single exception of contempt statutes in a few States, have cordially sanctioned these reforms and oftentimes have highly recommended them as being in line with the ideas of advancing civilization. Why any of the courts should single out the power to punish for contempts, which all the sages of the law concede to be an arbitrary and despotic power, as being so sacred that the people, through their General Assemblies, have no right to modify or regulate its exercise, no matter what the exigencies of the times may require, no reasonable man can conceive.

Two of the cases cited by the court in the Shepherd case are Res v. Oswald, and Res v. Passmore, which gave rise to the impeachment proceedings against Chief Justices McKean and Shippen and finally to the enactment of the statute of Pennsylvania, prohibiting the

exercise of jurisdiction to punish for contempt for a newspaper publication, which cases have not been followed in that State for one hundred years. Those cases were decided before the legislature passed any contempt statute, and hence, the courts could not have properly passed on this question. At that time the court undoubtedly had the power, in such cases, to punish for any common law contempt. Another case cited by the court in support of its contention is *Ex Parte* Robinson, 19 Wall. 505. That case arose in a district court of the United States, in 1873. The respondent, a lawyer of the court, had caused a witness to evade the service of process on him for which he was attached as for a contempt and disbarred. The matter being brought before the Supreme Court of the United States, that court after having referred to the act of Congress of March 2, 1831, said, "The Act in terms applies to all courts: whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, *may perhaps be a matter of doubt.* But that it applies to the Circuit and District courts, there can be no question, they being creatures of the statute." This is as near as the Supreme Court of the United States has ever come to deciding this question as to a Constitutional Court. That court has, however, been in existence one hundred and fifteen years, and it never attempted to exercise this power in the cases not embraced within the Act of March 2, 1831, either before its enactment or since.

THE LEGISLATIVE POWER UPHELD.

The constitutionality of contempt statutes was presented by the records, and upheld in Oregon in State v. Kaiser, 8 L. R. A. 58; in Illinois in Storey v. People, 79 Illinois, 45; in New York in Rutherford v. Holmes, 66 N. Y. 352; in North Carolina in Walker's case, 82 N. C. 95, and Cromartir's case, 85 *id.* 211; in Iowa in Dunham v. State, 6 Iowa, 245, and State v. Anderson, 40 Iowa, 20; in Florida in *Ex Parte* Edwards, 11 Florida, 174; in Kentucky in Arnold v. Com., 80 Ky. 300; in Mississippi in *Ex Parte* Hickey, 4 Smedes & M. 751; in Tennessee in State v. Galloway, 5 Caldw. 326; in Michigan in Langdon v. Judges, 76 Mich. 367; in Wisconsin in State ex rel. v. Judges, 44 L. R. A. 554; in Colorado in People v. Stapleton, 23 L. R. A. 789; in California in Bachelder v. Moore, 42 Calif. 412; in Ohio in Hale v. State, 36 L. R. A. 254; in Nebraska in State v. Pub. Co., 50 L. R. A. 195; in Indiana in Balderson v. State, 31; in Kansas in Re Barnhouse, 60 Kansas, 849; and in Connecticut in State v. Middlebrook, 43 Conn. 257.

In some of these cases there was much said about the inherent and essential power of courts in general, and that the legislature could not go so far in its restraint of the jurisdiction of courts as to entirely deprive them of all power to act in their own defense, but as the statutes referred to in these cases did not go that far, nor attempt to do so, what was said on this subject was mere dictum.

In a late case in Texas, Ex parte Foster, 60 L. R. A. 63, the Court of Criminal Appeals reviewed the cases in this country, and repudiated a great deal of what had been said by the courts in regard to contempt as mere dictum. From this review it seems that the power of the Legislature over contempt and contempt practice is sustained by an overwhelming weight of authority in the United States.

But it must be observed here that the courts, in their discussions of this subject, had in view, chiefly, the right of self-defense, which they insist, inheres in every court, that is, the right to defend itself against insult offered in its presence, to keep the peace in its own precincts and to enforce its orders and decrees, and they seemed to be apprehensive that if the power to interfere in any particular with this jurisdiction in contempt cases was conceded to the legislative department, that department might go too far in restricting them in such cases. In other words the legislature *might* abuse its power. But that is no valid reason why such power does not exist. All authority may be abused and often is abused. The legislative department represents the people in a higher and better sense than the other two departments of the government and to hold that it ought to be shorn of its rightful power, because it might abuse it, is directly contrary to the theory that the people are capable of self-government. In a popular government like ours, the presump-

tion ought to be constantly indulged that if the law-making power make a mistake, the people will discover and rectify it. It would be a violent presumption that the general assembly would desire to rob the judiciary of the power to carry out the ends for which it was instituted. It never has gone that far and never will until the people lose the faculty of self-government.

Another fact must not be overlooked in the examination of this question and that is no court in this country, or any country, for that matter, ever set aside a statute in order to acquire jurisdiction in a contempt case until the Supreme Court of Arkansas in the Morrill case in 1855 did that. That decision was not rendered until a half century after the Shippen case and a quarter of a century after the Peck case and the decisions in West Virginia, Virginia and Georgia, setting aside legislative enactments, in contempt cases, were made more than seventy-five years after the Shippen case and more than fifty years after the Peck case. And while Mr. Buchanan went astray in his prophesy that no matter how the Peck impeachment trial terminated, Peck would be the last judge to exercise the power to punish as for a contempt any one for libelous publications in newspapers and Lawless would be the last victim of the exercise of such power, the generation of 1830 had to pass away and the traditions of the past be forgotten by a new generation before any court could be found

that would go so far as to set aside a statute in order to exercise a jurisdiction so obnoxious to the people. This historical fact sheds a flood of light on what our fathers meant by their constitutions adopted seventy-five or a hundred years ago.

THE ISSUES OF FACT IN A CONTEMPT CASE.

There is one other phase of the Shepherd case that I desire to notice, and that is, what issues of fact are properly triable in a contempt case. The court on this point used this language: "The Attorney-General, in open court, demanded of the defendant and his counsel to know whether or not, they desired an opportunity to show the truth of the matters charged in the article aforesaid." And again the court says that when the defendant was "challenged to make his words good, he consummates his offending by failing absolutely to produce one word of testimony to show that he told the truth, and instead of making the *amende honorable* by *withdrawing the charge, and apologizing like a man*, seeks to escape punishment by challenging the jurisdiction of this court to protect itself from insult, and maintain the respect and dignity with which the people have invested it; denies that the facts charged are sufficient to constitute a contempt, and raises other technical and constitutional questions." And again it says, "He did not dare to attempt to prove or claim that it (the article) was true, but stood mute as to that, and sought to escape punishment

on other grounds, which were untenable. *He was therefore guilty of malice.*"

This offer to the defendant to permit him to prove the truth of the charge, under the circumstances was, to say the least, unusual, and out of the ordinary course. Here were seven judges who, it was alleged, had been charged with corruption by the defendant, and he is asked to prove to the satisfaction of these same judges, that they had been corrupted. The judges were to sit as a jury, not only to try the issue involving their own honesty, but they were also to sit as a court to determine all questions of law as to the competency of witnesses, and the admissibility of evidence. In other words, they, as a court, were to determine the *law*, and, as jurors, the *fact*. The mere statement of this proposition shows that no such issue could have been made in the way it was attempted to be made before the court in that case. And the fact, that the offer to permit defendant to prove the truth of the charge he had made, is strong proof that the charge made did not constitute contempt at all, but was, if untrue, a mere libel upon the judges, which should have been tried in another way. A contempt is an indignity to the majesty of the law, which is supposed to be present in all courts of justice; and when that majesty has been insulted, instant punishment should follow, and the truth of the charge contained in the insult is no defense. Let us illustrate this. Suppose a lawyer should enter a court room, and say to

the judge on the bench, "You are a corrupt scoundrel. You have been bought up by the adversary of my client, and I want you to vacate the bench and let an honest man take your place to try my case." What should a self-respecting judge do in such case? Would he call on the lawyer to prove the truth of the charge, or would he punish him instantly? Indeed would the truth or falsity of the charge have any bearing whatever on the question of the indignity thus offered to the law, whose minister for the time being the judge is? A judge that would parley with a party thus offending about proof of the charge, would indeed bring not only himself, but also the majesty of the law into contempt. If Shepherd had got up in the presence of the court, and had charged the judges with corruption, there would then have been no calling on him for proof of the truth of the charge. The judges would have, on the spot, punished him for this indignity offered to the court in its presence, whether the charge made was true or false. The court, in such a case, stands in the attitude of a parent towards his children, or a school teacher towards his pupils, and cannot permit its honesty to be called in question, or become a subject of debate, when it is publicly sitting for the transaction of business. Now I ask if a libel upon the judges in a newspaper is a contempt of court, why should the truth of the charge be made a subject of debate, proof or inquiry, any more than in case the same charge

is made in the face of the court while in session? None, that I can see; and the fact that the court was willing, in this case, to permit the defendant to prove the truth of the charge, if he could, is proof that the judges themselves made a distinction between a contempt committed in the presence of the court, and one not committed in its presence. If Shepherd's offense was a contempt of court, then the truth or falsity of the charge he made was immaterial; but if his offense was a mere libel upon the judges, then the truth or falsity of the charge should have been submitted to a jury, in another forum, as a common arbiter between him and them. The court erred, in my humble judgment, in holding that the article in question was a contempt of court; but having thus decided, it unquestionably did right in refusing a jury trial, *because there was nothing to try in that kind of a case*, except the fact of publication; and the court unquestionably erred in offering to permit the defendant to prove to them and to their satisfaction, that they themselves had been corrupted. Their corruption, *in a contempt case*, is not an issuable fact to be tried in any way, either before the court or jury, and if the court thought it was an issuable fact in that case, it ought to have sent it to a jury, which it could have done by ordering Mr. Shepherd to appear before the Circuit Court, or some justice of the peace, to answer for libel. That court, in the very nature of things, was not competent to try such an issue, which in-

volved its judges. But the court went further, and declared that because the defendant stood mute before it as to the truth of the charge, and had challenged the jurisdiction of the court, he was guilty of malice. The statement of the court shows, of itself, if other proof were wanting, the impropriety of the assumption of jurisdiction in the case. The Constitution itself declares that no man shall be compelled to give evidence against himself, and the right to stand mute when charged with crime has been recognized for centuries. Standing mute is equivalent to a plea of not guilty; but Mr. Shepherd was held to have added malice to the other offense charged by standing mute as to its truth, but challenging the jurisdiction of the court to try him in that way at all.

A plea of not guilty, in a criminal case, puts in issue every provable fact, including, in a libel case, the motives of the publisher, and the truth of the charges made. So Mr. Shepherd virtually put in issue the truth of the charge made, and his motives in making it. The court, in its opinion, deems this course of his, and his failure to make "the *amende honorable*" and "*apologizing like a man*" as an aggravation of his offense, adding malice to the previous wrong. This is not the view the Supreme Court of Wisconsin took in the case of State *ex rel.* v. Judges, *supra*, in regard to the course pursued by the accused parties there. The court, in that case, held that if they were honorable men,

and not mere slanderers, there was no other course open to the accused. Suppose Shepherd sincerely believed that he had told the truth, would it have been honorable for him to *lie* to the court about his opinion, and apologize for what he had done?

TECHNICALITIES.

The court goes on to say that Mr. Shepherd's objections were technical. Was it technical to challenge the jurisdiction of the court, and to demand a trial by jury? I think not. But suppose these objections were technical, why not entertain them? Technical objections in favor of the liberty of the citizen prevails in all criminal prosecutions, and why not in cases of contempt?

TRIAL BY JURY.

The court after having rightfully decided that the defendant was not entitled to a trial by jury *in a contempt case*, went on to say that if a jury trial had been awarded him, there was nothing to be tried; the court, it is said, was the judge as to whether the article was libelous or not, and its publication having been admitted, a jury, if called, would have had nothing to do but bring in a verdict by direction of the court. As has been shown, there would have been nothing to try by the jury or the court *in a contempt case*, but the court seemed to go upon the theory that there was something to try by calling on the defendant for proof of the truth of the charge. If that assumption of the court was correct,

then the issues should have been submitted to a jury, not in that case, but upon an indictment or information for libel, presented in the usual way.

The court, on this phase of the question, seems to have forgotten that in all trials for libel, the jury shall be the judges of the law as well as the facts, under the direction of the court; which means that while the court may instruct the jury on the law, the jury is at liberty to take its own view of the law, and render a verdict accordingly. In case Shepherd had been proceeded against in the usual way for a criminal libel, the jury, in his case, would have had a right to say the article in question was not libelous, no matter what we or the court may think about it. And again, the court seems to have overlooked another important element, involved in a jury trial, and that is, the amount of punishment to be inflicted. The court fixed the fine at five hundred dollars. A jury, if they found Shepherd guilty of a criminal libel, might have fixed the fine at one dollar, or some other nominal amount. And this is an important, and not a technical right of an accused party. But really all the observations of the court on this subject, and these observations of mine, add additional reasons, why the court made its fatal error in assuming jurisdiction in the case at all, but that some trial court, if, as Lord Campbell remarked, a prosecution for a libel upon the judges be necessary, in any event, should have tried the case in the regular course.

The history of this case emphasizes the reasons why the people, for one hundred and fifty years, have fiercely contested, and contest now, the power of the courts to punish, as for a contempt, a newspaper publication. The people have in the past fought, and fight now for the freedom of speech and of the press, and they have a deep conviction that the judges as well as the governors and legislators, are their mere servants and that the acts of all should be subjected to the scrutiny of the press especially. Publicity of official acts has become a peculiar demand of this age, and what a glorious work the public press has wrought lately in exposing corruption in official life, not only in Missouri, but in the nation, nay, in the countries of Europe. But it is said no one has a right to libel an officer. That is true, but I believe with Jefferson, that where an abuse cannot be destroyed without destroying the use of a privilege, the abuse should be tolerated, "where reason is left free to combat it." This is the theory of the Theodosian law referred to by the court in the Shepherd case. The exercise of the power to punish for contempt for a newspaper publication, while it might destroy the abuse, would also destroy the use of the privilege of free speech, and a free press. As far back as King John it was declared by Magna Charta that a party charged with crime should be tried by a jury of the vicinage. But in a case of contempt, not only the right to be tried by a jury is denied, but the right to be

tried in the county is denied also. This last right has always been deemed essential. Our fathers made the deprivation of that right one of the grounds of the indictment preferred by them against George III, in the Declaration of Independence. Shepherd lived in Warrensburg, Johnson County. The Supreme Court sits in Jefferson City, in Cole County, a hundred miles away, and he was taken from his home, where he published his paper, to Jefferson City, and there his case was disposed of. If the court had the power to take him that far to be tried for a libel upon it, then it can take citizens from Dunklin County, a distance of three hundred miles, and try them for the same thing, away from their neighbors and those who know them, and does it require any great stretch of the imagination to believe that many publishers, not knowing the line of demarkation between legitimate and illegitimate criticism of the court and judges, rather than take any chances of being dragged off a long distance to be tried by judges whom he has been charged with grievously wronging, will not go as far as they really have a right to go? Thus the use of the privilege of a free press would be destroyed, in trying to destroy its abuse.

The court thought the power it exercised in the Shepherd case was necessary for the protection of society; but if its rulings shall have the effect to censor the press, and prevent its going as far as it has a right to go, may not society drift back, imperceptibly,

into a despotism, and be more harmed than by an occasional libelous criticism of the ministers of the law? And besides that, the ordinary remedies for criminal libel ought to be sufficient to keep the press within due bounds without the exercise of a power the people believe, and have always believed, to be unjust and usurped.

VII.

The Court's Error and the Remedy.

That the decision, in the Shepherd case, is pernicious, and contravenes fundamental principles of liberty, there can be no question. That the courts have the power to set aside statutes on the ground that they are repugnant to the Constitution, there is now likewise no question, though a hundred years ago that proposition was not conceded by any means. The three departments of government have always been considered co-ordinate and equal, and were established by the Constitution as checks upon each other, and the power of the courts may be carried too far, and become a menace to free institutions, and when that occurs, it is the right — nay, the duty of the other two departments, which peculiarly represent the popular will, to resist any encroachment upon their power which may imperil the fundamental rights of man, by all the constitutional and peaceful means at their command. This has often been done in the past.

Ordinarily where the courts have set aside statutes, enacted by the legislative departments (the plural is here used because the

executive forms a part of the law-making power), it has been to vindicate the public and private rights of the people; but in the Shepherd case that was not the effect. As has been shown, the assumption of jurisdiction there had the effect to deprive a citizen of a fundamental, constitutional right, the right of trial by jury of the vicinage, which the other two departments had tried to guaranty, and which they thought they had guarantied to him. In that case the issue is sharply made between the legislative power and the judicial power, narrowed down to the simple question whether the legislative departments can interpose by legislation to protect the citizens of the State by restricting and limiting the power of the courts, where the contest is between the rights of the citizens on one side, and the power of the courts on the other. The Supreme Court, and the judges of that court, were as much parties in interest in the Shepherd case, as the prosecuting witness is a party in interest in any criminal prosecution, and ought that court, according to the eternal principles of right, have set in judgment in their own cause? Lord Campbell said such a position of a judge, in such case, was an *invidious one*, and it is the universal opinion of mankind that, no matter how exalted the ministers of the law may be, they cannot entirely free themselves from the feeling *that they have been injured, and that they must vindicate themselves.*

It must not be forgotten either that according to the decision in the Shepherd case, the sole measure of the power of the courts in

contempt cases is the discretion of their judges. That is the power possessed by the Czar of Russia, a power measured alone by his own discretion, and with him, we call it a despotism, absolutism, tyranny. Such a power as that has been resisted by the Anglo-Saxon races for centuries, and is hateful to the minds and aspirations of a free people, and we had reposed in the fond assurance for nearly a century, that no such principles had found lodgment in our institutions, and the great question is presented to the people of our State whether there is any remedy for the assertion of this principle by the court, and if so, what it is. The legislative departments, perfectly disinterested, declared over sixty-five years ago that the courts should not have the power to try, without the intervention of a jury, questions in which the judges were personally interested, and now, after the lapse of so long a time, the court, an interested party, says the other departments had no power to impose any such restraints, or, for that matter, any restraints at all, on it. Mr. Shepherd, though he had been deprived of his property by the exercise of a power which was illegal, was utterly helpless. The law, provided by the legislature for his protection, was set aside, and there he stood in the presence of the judges, whom he was accused of libeling, without the right to have this case sent for trial before another, and impartial tribunal aided by a jury, and without the right of appeal to a higher court, for he was then before the highest court in the State.

In that case the court said that it would not "tolerate any interference by a co-ordinate branch of the government or by any one else with the powers and duties and prerogatives of this court." That is not the language of an equal to an equal, but of a superior to an inferior. The legislature on its part has an equal right to assert that it will not tolerate any interference by the judiciary with its powers, duties and prerogatives. Then what? The people must answer.

The court, after having set aside the contempt statute of this State, which had abrogated the rules of the common law applicable to certain classes of contempt, proceeded to incorporate those rules of that law into the jurisprudence of this State. Blackstone is cited and what he says is construed to mean that every unjust criticism of the court acting in its judicial capacity is a contempt whether such criticism be in relation to a pending matter or not. The court lays down the broadest and most comprehensive rule of the common law as follows: "In Rex v. Almon, Wilmot's Notes of Opinions and Judgts., p. 233, it was held to be contempt of court and a libel, punishable by attachment, to publish a pamphlet asserting that judges have no right to issue attachments for libel upon themselves and denying that reflections upon individual judges, are contempts of court." Many other cases are cited by the court but this case goes to the extreme limit of the common law on the subject of contempt and if that be the law in Missouri

the courts are bound by no restraints and if the legislature has no power to set bars and doors as to contempts and say to the courts "Hitherto shalt thou come — but no further" then indeed are the people of this State subjected to a most extraordinary and dangerous jurisdiction both as to the subject-matter of contempts as well as the extent of the punishment to be inflicted. The court imposed a fine of $500 on Mr. Shepherd, ten times as large as the statute of the State prescribed and the court cited Reg. v. Skipworth, 12 Cox Crim. Cases, 371 (also an English case) in which the accused was fined five hundred pounds, equal to $2,500, so that the court can go to that extent at least which is fifty times larger than that prescribed by the statute. But the court having freed itself from all statutory restraints is not limited to $2,500 or the maximum fine that may be imposed in a contempt case but it can, at its discretion, impose any larger sum it sees fit, nor is the extent of the imprisonment that may be inflicted in the case limited otherwise than by the discretion of the court. That the court intended to make the rules laid down in the cases it cited as the law of this State is made manifest by the excerpt from its opinion: "Thus at great pains and tedious length the cases bearing upon the matters involved in this case have been collected and digested *with the purpose and to the end that the people may know the grounds upon which judgment in this case rests and so that all*

may know the law and avoid being guilty of like offenses, or else offend knowingly, and hence invite punishment." According to the definition of the legislative power heretofore given, is not that excerpt a legislative act rather than a judicial determination of a concrete case? The court having set aside our ancient statute which had prescribed the law of contempt, the court, it must be presumed, felt the necessity of stating, "at great pains and tedious length," the rules of law which it intended to substitute in lieu of the abrogated statute, so that the people might know what law it would recognize in future cases. Why it applied these new rules of law, which the court declares are in force in Missouri, to Mr. Shepherd's act, making them *ex post facto* as to him and others violating a plain provision of our Constitution, is not stated. In order to cover the whole ground on the subject of contempts, so that "the people might know the law and avoid being guilty of like offenses," the court did not confine itself to the point in judgment, which was the criticism of the court in a pending case but it went outside of the record and disclosed what the law shall be for a criticism of the court in cases wholly disposed of. Take the whole opinion of the court with the above excerpt from it and there is no escape from the conclusion that the court exercised the legislative power. The power exercised by the court was legislative in two aspects. It was legislative because it virtually repealed a statute and

in the second place it was legislative in that it re-enacted certain common law rules which the legislature had declared should not prevail in this State. The rules of the common law which the court declares to be in force here have all the insignia of laws, which can be made only by the General Assembly under our Constitution. They are emphatically rules of civil conduct of general and universal application. The court, therefore, in my humble judgment unquestionably violated the very provision of the Constitution, which it claims the legislature had violated in the enactment of the contempt statute.

It is unquestionably the province of the legislative power to enact and publish the law of contempt so the people may know what it is and avoid its violation. But the court denies the power of the legislature to do that and proceeds to do it itself. Must the legislature stand dumb and helpless in the presence of a co-equal and co-ordinate branch of the State government?

And again it is asked if there is a remedy for such an un-American situation in our State. If so, what is it?

The judges can be impeached but this remedy has not generally been found practicable because the judges cannot be convicted without proof that they *willfully* usurped power and this is hard to do.

The General Assembly may, as a protest against the exercise of jurisdiction in this case, refund the fine imposed on Shepherd,

following the example set by Congress in refunding the fines imposed under the Sedition Law.

And again the court may be called on to overrule this decision and return to correct principles.

Or a constitutional amendment can be adopted, but if this be done the preamble to it ought to state that the legislature had always possessed the power to restrict the courts in contempt cases and the amendment is adopted simply as declaratory of what the law has always been.

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APPENDICES — CONTENTS.

APPENDIX A.

BATTLES FOR THE FREEDOM OF THE PRESS IN NEW YORK.

ZENGER'S CASE.

In our history many cases of thrilling interest, illustrative of this conflict and of the evolution of a free press and an independent judiciary and government, can be found. The first, among these, is that of John Peter Zenger, in the city of New York, August 4th, 1735. As it created the most intense interest in the public mind, the result of which was "the dawn of the spirit of liberty, which afterwards revolutionized America," the story of Zenger and his trial will be an interesting one at a time when the contest between the courts and the press is made prominent by the trial of the editor of the Warrensburg *Standard-Herald*. Zenger was born in Germany and was brought to this country in the reign of Queen Anne at the charitable expense of the crown of England. In 1734, William Cosby was governor of New York and two papers were published there, one, the *Gazette*, an administration organ, by William Bradford, and the other, in opposition, the New York *Journal*, by Zenger. Several articles were published in Zenger's paper, severely criticising the administration of affairs in New York, and Governor Ross, on November 6, 1734, issued two proclamations, one of which recited that Zenger's paper had contained articles reflecting on the

legislature, "the most considerable persons in the most distinguished stations in the Province and upon His Majesty's lawful and rightful government and just prerogative," which were calculated to stir up "factions, tumults and seditions" among the people, and offering a reward of £50 to any one who would discover the writers thereof: the other offered a reward of £20 for the discovery of the author "of two late scandalous songs or ballads, highly defamatory of the administration of His Majesty's government." Zenger was arrested on Sunday, November 17, 1734, for publishing an alleged libel, which was in substance that "the people of this City (New York) and Province think, as matters now stand, that their liberties and properties are precarious and that slavery is like to be entailed on them and their posterity, if some past things be not mended." He was put in jail and denied the use of ink, pen and paper or the liberty to speak to or see the people. He was, on his application, taken before the Chief Justice, on writ of Habeas Corpus, on November 25, where it was adjudged that he might be bailed in the sum of $2,000, and in case he could not find bail be permitted to have pen, ink and paper and to speak to his wife and friends, "through the hole in the door" of the prison. He failed to give bond and he wrote in jail for his paper and its publication continued. The Journal, containing the alleged libelous matter, was ordered to be burnt by the common hangman,

and the mayor and the magistrates of the city were directed to be present to witness this holocaust of the press. These officers as well as the members of the Provincial Assembly, however, refused to attend. This enraged the governor still more and, after nine months imprisonment, Zenger was brought to trial on August 4, 1735, before two judges, one of whom had been appointed by the governor alone, without the sanction of the council, and Zenger's attorneys objected to his being tried before a court so constituted, which the judges, including the judge objected to, held to be a contempt of court and the attorneys were summarily "thrown over the bar," in the parlance of those times, *i. e.*, disbarred.

The friends of this editor were determined, however, he should be defended and they quietly employed Andrew Hamilton, the celebrated jurist of Philadelphia, for that purpose. At that time the truth of the charge alleged to be libelous could not be given in evidence as a defense and the court refused in this case to allow Zenger to prove the truth of the charges he had made in the Journal and no evidence of that character was adduced; and, as the publication of the objectionable articles, songs and ballads, was admitted there seemed to be no escape for the accused; but Hamilton was equal to the emergency. His speech to the jury was the most remarkable and unique one in the history of jurisprudence in this country. He argued to the jury that they were the judges of the law as well as the

fact and *as they had been taken from the vicinity, in which the publications had been made, they were supposed to have been selected, because they "had the best knowledge of the fact to be tried."* He insisted that if the jurors believed the publications to be true, they should acquit the defendant. He made an eloquent plea for the freedom of complaint and remonstrance against governmental action and of the freedom of the press. He thought it of the highest importance to the well-being of society, that the freedom to criticise the action of the ruler, who brings his personal feelings and vices into his administration, by which the people find themselves affected, ought to be recogized and he added that "*all the high things, that may be said in favor of rulers and of dignities upon the side of power, will not stop the people's mouths, when they feel themselves oppressed.*" The judges instructed the jury "that as the defendant had confessed the publication of the words, the only question for them was whether the words were libelous and as this was a question of law they could safely leave it to the court." The jury, however, returned a verdict of not guilty, whereupon the crowds filled the court room with shouts. The chief justice admonished the audience and threatened the leader with imprisonment, whereupon a son of Admiral Norris declared himself the leader and called for more cheers, which were repeated with a will. Mr. Hamilton was royally entertained at a

banquet, and on his starting to Philadelphia a salute was fired. He was presented with the freedom of the city by the Common Council "for the remarkable service done by him to the city and colony by his learning and generous defense of the rights of mankind and the liberty of the press." This freedom of the city was inscribed on a gold box presented to him. Thus terminated this remarkable case, which sounded the keynote for the revolutionary spirit then just beginning to manifest itself.

Here, again, should be noted the contrast between the methods of the past and the present. It seems the judges at the trial of this case did not interpose, nor did the government's attorney interpose any objection to this course of argument of Mr. Hamilton to the jury — an argument which not only left to them all questions, both of law and fact, but also authorized them to find the fact from their own personal knowledge if they had any. Such an argument as that at this time would not be tolerated anywhere in our land. Thus, while the judges who tried this case strained the doctrine of libel beyond what is now allowable, were more liberal towards the defense in permitting the powers of the jury to be enlarged beyond what the courts would allow to-day. This trial left a lasting impression on public opinion, for Governor Ross having died in 1735, Bradford found it necessary to publish a long address to the people in his paper, the *Gazette*, in defense of, or

rather apology for the way he had conducted it as an organ of the administration.

The *Journal*, published by this intrepid pioneer of freedom, was small in size, and printed on much worn pica type. There were but few advertisements in it, but among the few there was this which will no doubt be read by the public of to-day with interest as well as amusement: "To be sold by Peter Lynch near Rutgers' Brewhouse very good orange butter. It is excellent for gentlewomen to comb their hair with. It also cures children's sore heads." Zenger continued to publish the paper till his death in 1746, when his wife took charge of it and managed it for a time but it soon fell to a son, John Zenger, who published it till 1752, when it died for want of support. A short time before its demise the following curious item appeared in its columns: "The Country subscribers are earnestly entreated to send in their arrears; if they do not pay promptly, I shall leave off sending the paper and try to recover my money otherwise. Some of these easy subscribers are in arrears for more than seven years. After serving them so long, I fancy it is time, and high time, that they should repay me my advances; for the truth is — and they may believe me — I have worn my clothes threadbare.

N. B. Gentlemen: If you have no money to spare, still think of your printer when you have read this advertisement and thought on it. You can not do less than say 'come

wife' (I address myself principally to married folk, but let bachelors take it to heart also) 'come wife, let us send the poor printer some flour, or a few hams, butter, cheese, poultry, etc.'

In the meantime while I am your obedient servant, JOHN ZENGER."

But in spite of this pathetic appeal and in spite of the great service the *Journal* had rendered the province and indeed mankind, it was suffered to die, thus, furnishing an impressive instance of the ingratitude of the people towards those who sacrifice and suffer much for them and for the advancement of their interests, and besides that, Zenger has been forgotten by posterity, to which he left such a rich legacy. Zenger! Who is Zenger? the present generation may ask. Zenger was a poor German boy, who came to this country two centuries ago, at public expense, and no doubt, like thousands of others of that period, after reaching our shores, was sold *at auction*, for a time, to repay that expense. He published, what he considered he had a right to publish, the truth about public men and public affairs, for which he was imprisoned nine months in the common jail away from wife and home but his dauntless spirit yielded not nor did he cease to defend himself and the freedom of the press with vigor and courage while in durance vile. He contended not for the right to slander and libel the government and its officers but he did claim the right to lay before the people the

truth in regard to both and he waged a fierce battle and even went to prison in defense of that right. He won a glorious victory and though the principle for which he fought was not embodied in the law of New York for three quarters of a century after that, yet his struggle and his martyrdom aroused a spirit of freedom that has gone on from victory to victory until we have to-day the freest government on earth. Zenger is one of the uncrowned, unwept and unsung heroes of our land. There is nowhere any memorial statue or arch to him. His name is an unfamiliar sound to the people who enjoy the fruits of his strife and sufferings. His body has been mouldering in the ground for over a hundred and fifty years but his soul, his proud free soul, still goes marching on.

The action of the Virginia Assembly presents quite a contrast to the action of the New York Assembly along this line. A few years after the trial of Zenger, William Parks, the government printer of Virginia, was arraigned before the House of Assembly on the charge of publishing in the *Gazette* an assertion that a certain member of the House had some years previously been convicted of sheep-stealing, and Mr. Parks was allowed by the House, in spite of opposition to the contrary, to prove by the records of the court the truth of the charge; and was upon a hearing acquitted. The member who was charged with sheep-stealing thereafter retired in disgrace from public life.

MC DOUGAL'S CASE.

In 1769, a handbill was prepared and caused to be printed by Alexander McDougal, charging the New York Assembly with the betrayal of its trust relative to the enforcement of the Mutiny Act, for which he was arrested and arraigned before the assembly which held the document libelous and McDougal was imprisoned. His condemnation was entered on page forty-five of the journal of the assembly and that number, thereupon, became the countersign of the Sons of Liberty. While in prison, his callers became so numerous he was induced to fix and did fix the hours for his daily receptions at from 3 to 6 P. M. The New York *Journal*, on February 15, 1770, published this item: —

Yesterday, the forty-fifth day of the year, forty-five gentlemen, real enemies to internal taxation, by or in obedience to external authority, and cordial friends to Captain McDougal and the glorious cause to American liberty, went in decent procession to the New Goal; and dined with him on forty-five pounds of beef steaks, cut from a bullock forty-five months old, and with a number of other friends who joined them in the afternoon, drank a variety of toasts, expressive not only of the most undissembled loyalty, but the warmest attachment to liberty, its renowned advocates in England and America, and the freedom of the Press.

McDougal shared a better fate than Zen-

ger, for his admirers have erected a statue to his memory in New York. This was probably due to his participation in the stirring events just preceding the Revolutionary struggle.

CROSSWELL'S CASE.

New York furnishes another interesting case on the subject of the freedom of the press. Harry Crosswell was publisher of the *Wasp*, a Federalist paper of New York, and on the ninth day of September, 1802, he published this item: —

"Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer; for calling Adams a lousy headed incendiary, and for grossly slandering the private characters of men, whom he knew to be virtuous."

Crosswell was indicted under the laws of New York for criminal libel and at the trial he offered to prove in defense of the charge that one James T. Callender had written and published a pamphlet during the presidential campaign of 1800, entitled "The Prospect Before Us," in which were contained the defamatory epithets applied to Washington and Adams, and that Jefferson had paid Callender $50 before the publication of the pamphlet and the same amount afterwards as a reward, "thereby showing his appreciation thereof;" but the court held, following the ruling in the Zenger case, that the truth of the charge against Jefferson, if proved, constituted no defense, and Crosswell was convicted. A motion for a new trial was argued

before the court en banc in 1804, one of the judges being Chancellor Kent. Alexander Hamilton, without fee or reward, appeared for the accused, and his argument was along the same lines of his namesake, Andrew Hamilton, in the Zenger case — that it was not a libel to publish the truth. The court being equally divided, the motion for a new trial was overruled; but strange to say, Crosswell was never called up for sentence and there the matter ended, which shows that even the judges who had decided that the truth of the charge in a libel proceeding could not be given in evidence, as a defense, faltered when they came to the enforcement of a verdict obtained by the application of such a harsh and unjust rule. Hamilton, a few weeks after this last effort of his in defense of the freedom of the press, was killed by Aaron Burr in a duel. It is pleasing to note that the great law commentator, Kent, favored the doctrine that the truth of the charge, alleged to be libelous, could be given in evidence and that the jury should be the judge of the law as well as the fact, which rule now generally prevails in all the States.

And this principle as well as the principle that the jury should be the judge of the law and fact in a libel case was in 1805 put into a statute of New York and there it is yet.

Thus in the Crosswell case a President of the United States and the old political enemy of that President were concerned. Crosswell had made a serious charge against Jefferson

and Hamilton probably rejoiced in the opportunity offered him of trying, at least, to prove that the charge was true, though he failed in his object; but the principle he contended for is fundamental in all free governments, and in support of that principle, Jefferson was as earnest as Hamilton, if not more so.

APPENDIX B.

THE BATTLES FOR THE FREEDOM OF THE PRESS IN PENNSYLVANIA.

THE MC KEAN CASE.

In 1788 a celebrated case arose and one of the principal actors in it was Thomas McKean, who was born in Pennsylvania in 1734. He was a delegate to the Colonial Congress of New York in 1765 and was the only member of the Continental Congress during the whole time from 1774 to the close of the Revolutionary War in 1783. In 1781 he was president of Congress. In 1777 he was appointed Chief Justice of Pennsylvania, which place he filled till 1799, when he became Governor of the State, which office he held till 1808. One feature of his career will be of special interest to the present generation as illustrative of the peculiarities of the methods of those times. He was a citizen of Pennsylvania and yet in all the proceedings of the Congress and as a signer of the Declaration of Independence he is credited to Delaware and while he was a delegate from Delaware in Congress and even its president he was Chief Justice of his native State. This can be accounted for, however, by the fact that until the adoption of the Constitution of 1787, Delaware, though in a sense a separate province, in another sense was a part of Pennsylvania. McKean was a patriot but he was an imperious man, and in his judicial relations was oftentimes considered arbitrary.

He was a man of strong will and personality and usually overcame all opposition, however generated. His part in one of the first conflicts arising out of a trial for contempt of court in the State of Pennsylvania, will now be given. The Eleazer Oswald mentioned in the proceeding had been a colonel in the Revolutionary army and at the time of the controversy was publisher of the *Independent Gazette*.

On July 12th, 1788, Mr. William Lewis moved for a rule in the Supreme Court of Pennsylvania on him to show cause why an attachment should not issue for the publication of a libel by him during the pendency of a suit between Brown and Oswald. It appears that Oswald inserted in his newspaper, the *Independent Gazette*, several anonymous pieces against the character of Andrew Brown, a master of a female academy in the city of Philadelphia. Brown applied to him to give him the names of the authors of these articles and, being refused, he brought an action for libel against Oswald, returnable into the Supreme Court on the second day of July and therein demanded bail for $1,000. Previously to the return day of the writ, the question of bail being brought by citation before Mr. Justice Bryan, at his chambers, the judge, on a full hearing, discharged defendant and plaintiff appealed from this order at chambers to the court. Afterwards, on July 1, Oswald published under his own hand, an address to the public,

in which he took occasion to insinuate, as there was a brother of the plaintiff's patron, Dr. Rush, on the Bench, he might not receive a candid hearing and he added: "However, if former prejudices should be found to operate against me on the Bench, it is with a jury of my country, properly elected and empannelled, a jury of free men and independent citizens, I must rest the suit. * * * The doctrine of libel, being a doctrine incompatible with law and liberty, at once destructive of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in Pennsylvania; and the vile measures, formerly taken to lay me by the heels on this subject, only brought down obloquy upon the conductors themselves. I may well suppose the same love of liberty still pervades my fellow-citizens and that they will not allow the freedom of the press to be violated upon any refined pretense which oppressive ingenuity or courtly study can invent." Here we find an exponent of one of the political parties of the times brought face to face with the judiciary.

Upon this state of facts, after hearing a full discussion by William Lewis for the motion and Jonathan Dickenson for respondent, Chief Justice McKean delivered the opinion of the court and held that Oswald had been guilty of a contempt of court in the publication of this address.

Oswald was called up and McKean said to him: "Having yesterday considered the

charge against you we are unanimously of the opinion that it amounted to a contempt. Some doubts were suggested whether even a contempt of court was punishable by attachment; but not only my brethren and myself but likewise all the judges of England think that without this power no court could possibly exist. Nay, that no contempt could indeed be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity and there is not any period when it can be said to have ceased or discontinued. On this point therefore we entertain no doubt." And Oswald was fined £10 and imprisoned one month. He thereupon went before the legislature and attempted to have articles of impeachment preferred against Chief Justice McKean and his associates for the judgment rendered in this case. The points made by the complaint were: 1. That the Chief Justice had protracted his imprisonment beyond the legal expiration of his sentence. 2. That his imprisonment was unconstitutional, illegal and tyrannical. A heated debate ensued. The public mind was much inflamed. The memories of the Revolutionary struggle were still fresh in the minds of the people. And though the Chief Justice had interpreted the law correctly as it then stood beyond cavil and had not acted through prejudice, for he had held that Oswald's address was a contempt of court, not so much because it reflected upon the integrity of the judges, as because it

sought to prejudice the public mind against his adversary and arouse public sympathy in his own behalf, there were twenty-three out of fifty-seven votes in the lower house for his impeachment.

It may be added that Judge McKean probably entertained extreme views on the subject of libel. In 1797 he bound over Cobbett, publisher of the *Porcupine Gazette* at Philadelphia, to the grand jury for an alleged seditious libel against the *King of Spain* and afterwards instructed the grand jury that the publications were libelous because they were calculated to defeat the reconciliation of the governments of Spain and the United States. The question involved became a party issue, the Federalists supporting and the Republicans opposing Cobbett, and the grand jury by a party vote refused to indict him.

THE SHIPPEN CASE.

This attempt of Oswald's to have the judges impeached failed, but the controversy had made its impress upon the popular mind. It was McKean's great heart and stern nature and sterling qualities that gave him the victory. He was afterwards thrice elected governor of his State, and during his administrations many attempts were made to limit the authority of the courts to punish for contempts by the summary process of attachment, by legislative enactment, but the governor's influence thwarted every such attempt, and another case arose, involving the same principle, in 1804.

In that case Edward Shippen, who succeeded Judge McKean in 1799 as Chief Justice of the Supreme Court of Pennsylvania, was concerned. Judge Shippen was born in Philadelphia in 1729, and was eminent in the councils of his State. In 1804 he was still Chief Justice, and was then seventy-three years old. The case here referred to was that of Respublica v. Passmore. In that case the publication complained of contained no reflection upon the court, but was a libelous charge against the defendants in an action brought by Passmore in the Supreme Court, charging him with having sworn to what was not true in an affidavit. The court proceeded against him summarily by attachment for contempt, and fined him fifty dollars and ordered him to be imprisoned thirty days. Mr. Passmore complained to the Legislature against Chief Justice Shippen and Justices Yeates and Smith for this proceeding against him, which resulted in an impeachment preferred by the House of Representatives against them on the 23d day of March, 1804. They were tried before the Senate in January, 1805, and on the 26th day of that month, were acquitted by a vote of thirteen senators pronouncing them guilty and eleven not guilty, the Constitution requiring two-thirds of the members present to convict.

Public excitement was at fever heat, and in 1809 the Pennsylvania Legislature, under the administration of Governor Snyder, enacted a law restricting the courts in the punishment of

contempt and expressly prohibited this process for punishment for "publications out of court respecting the conduct of judges, officers of court, jurors, witnesses or parties," but authorized a proceeding by indictment for the same.

This is the history of the remarkable contest in Pennsylvania and it terminated in the complete triumph of the legislative over the judicial branch of the government of that State. The intensity of the feeling engendered, in that State, by these trials may be realized by noting that twenty-three out of fifty-seven representatives in the lower house of the assembly in 1788 voted to impeach the Chief Justice of the State, a signer of the Declaration of Independence and a patriot who had stood firmly and conscientiously with the fathers of the Revolution from 1765 to the end of the war and that the House in 1804 did actually impeach Chief Justice Shippen and his associates and on their trial before the Senate a majority (thirteen to eleven) voted for their conviction and they escaped only because the Constitution required a two-thirds vote to convict them.

To fully appreciate the lessons of these trials we must carefully note the exact point in controversy. The parties imprisoned by the court for contempt, and the public, as represented by the General Assembly of Pennsylvania, did not contend that the right to slander or libel the courts or the parties to the litigation in the courts, existed, but they all,

with one accord, objected to the *method* of determining what was libelous or slanderous, the people insisting on the right of trial of such a question by a jury before the courts, while the other party claimed and exercised the right of the interested court to try the issue without a jury.

APPENDIX C.

THE BATTLES FOR THE FREEDOM OF THE PRESS — THE ALIEN AND SEDITION LAWS OF 1798.

Probably no event in our history, except our Civil War, has had a profounder influence on the course of administration and the evolution of American institutions than the Alien and Sedition Laws of 1798. They were a controlling factor in the Presidential election of 1800, and they were the occasion of putting, for the first time, in concrete form, the doctrine of States' Rights, containing the germ of secession and nullification, which, sixty odd years later, eventuated in the attempted secession of the Southern States, in Civil War and in the final abolition of slavery. The causes which impelled Congress to enact these laws may be briefly stated.

After the commencement of the French Revolution in 1789, the sympathies of the American people were, for the most part, with the Revolutionists; and, when England and France became engaged in war in 1793, a large number of our people insisted we owed it to the latter country, for the assistance she had rendered us during the Revolutionary War, to espouse her cause against our and her common foe, Great Britain. Jefferson, who had been in Paris for some years prior to and at the breaking out of the Revolutionary movement there, and who was in complete sympathy with the Revolutionists, was at the head of this party. Washington, then Presi-

dent of the United States, on the contrary, was opposed to espousing the cause of either combatant, but favored impartial neutrality between them.

Citizen Genet arrived at Philadelphia in April, 1793, as the Minister of the French Republic, and at once sought to involve this country in war with Great Britain, and issued commissions to vessels of war to sail from American ports to cruise against the enemies of France; and on April 22, 1793, the President issued his celebrated proclamation of neutrality in the war among the nations of Europe. Genet pretended to feel very much outraged because our government would not espouse the cause of his country, and threatened to appeal to the people of the United States; whereupon Washington demanded his recall as Minister, which demand was granted; but Genet remained in this country. It was said Genet introduced the idea of Democratic societies, which were first formed in the United States about this time, in imitation of the Jacobin clubs in France. At the same time, the friction between the United States and Great Britain was becoming intense. On our part, we had failed to induce the States to restore the property of the Tories, which had been confiscated during the Revolutionary War, as provided by the Treaty of Peace of 1783; and England, on her part, had failed to carry out her stipulations in the same treaty, in regard to the vacation of the forts on the Great Lakes. At

this juncture of affairs, Washington appointed John Jay special envoy to England, who negotiated another treaty. The Jay Treaty, as it is known in history, was submitted to the Senate for ratification in June, 1795, and was ratified the same month. This treaty was very unpopular among a large portion of the American people, chiefly because it provided for the payment, by the national government, of all debts due, by individuals, to British merchants or subjects, which were prevented from being collected by adverse State legislation, just after the close of the Revolutionary War. These debts were mostly due to British subjects, who had never been here, or to former British residents, who had remained loyal to the British government. The ratification of this treaty caused intense excitement in the country, the extent of which may be realized by the fact that John Jay, the author of the treaty, and one of the fathers of the Revolution, and the first Chief Justice of the Supreme Court of the United States, was burned in effigy; and Hamilton, a strong advocate of the ratification of the treaty, was pelted with stones in the street, by which he was wounded till the blood trickled down his face. Before the ratification of this treaty the feeling of hostility against England was very strong; but its ratification made it worse for a year or two. The decrees, issued by Great Britain and France, against neutral vessels trading with each other, had the effect to interfere with our commerce on the seas;

and these not only intensified the feeling of hostility against England, but aroused a spirit of positive opposition against France for the first time. The controversy became a partisan one, the Republicans favoring France, and Washington and the Federalists favoring neutrality. This was the status of affairs when Washington retired from the Presidency in 1797. Genet was still in this country as an agitator in French interests, and, about the same time, France sent over here Volney, Cooper, Preistly, Paine, Rowan, Tandy and others to convince us our Revolution had not gone far enough; and Great Britain sent her emissaries to convince us it had gone too far. The emissaries of France went from village to village, with a view of creating a sentiment among the people for our intervention in the war in her favor. Our neutrality embittered her against us, and her decrees, affecting the commerce of the world, aroused a spirit of opposition against her among us; and in 1797, our relations with her were becoming very much strained. The American Minister, Charles C. Pinckney, had been expelled from their territory by the French rulers, who also issued new orders for depredations upon American commerce. Congress passed a law, in June, 1797, to prevent American citizens from fitting out or employing privateers against nations at peace with the United States; and the President was authorized to call out the militia. Notwithstanding the course of

France, in expelling our Minister from its territory, and its depredations upon our commerce, the President, in order to avoid a rupture and war, appointed Charles C. Pinckney, Elbridge Gerry, and John Marshall special envoys to the Republic of France, with ample power to negotiate a treaty of commerce and amity. These gentlemen met in Paris in October, 1797, and attempted to execute their commission. The events which followed were calculated to excite, and did excite, the indignation of the American people. The French government refused to recognize, officially, our envoys, but employed individuals to confer with them in their private capacity. The correspondence, on the part of those representing France, was not done in their own names, which were then unknown, but by the letters X Y Z; and the letters passing between our Ministers and these unknown parties are known in history as "The X Y Z Correspondece." Our Ministers soon discovered that no treaty could be entered into, which would be honorable to the United States; and the French government ordered Pinckney and Marshall, on account of their staunch Americanism, to leave the country, but invited Gerry to remain. When the dispatches from our envoys were made public, they excited very general indignation in the United States, particularly when it was known that the French negotiators had demanded money as the price of peace with us. Our people responded to the sentiment of Mr.

Pinckney on that occasion, "Millions for defense, but not a cent for tribute." Mr. Gerry was severely censured for not leaving France with his colleagues, and he was finally ordered home by the President. This was the situation during the first session of the Fifth Congress which lasted till July, 1798. This Congress passed laws for the protection of navigation, for maintaining neutrality, for the defense of the sea-coast, for the suspension of commercial intercourse between the United States and France, and for raising and equipping an army for defense; and Washington was again called upon to command our military forces. In 1798, it was estimated that there were thirty thousand French citizens in the United States, clamoring for our intervention in favor of their country; and fifty thousand British subjects, some of whom had been Tories during the Revolutionary War; and of course, the presence of the latter among us was well calculated to inflame the public mind not only against them, but also against their country, especially when it is remembered that they were here for the purpose of collecting debts, the collection of which had been prohibited by State legislation, because of their want of fealty to the Revolutionary cause.

These were the conditions in July, 1798, and this the feeling in this country towards the citizens of France and the subjects of Great Britain; and these were the chief causes of the passage of the Alien Law, but there

were other causes for an embittered feeling against the press, and partially against aliens, which contributed to the sentiment in favor, not only of the Alien Law, but also of the Sedition Law; and these also assumed a partisan hue.

The newspapers became the organs of the respective parties, and during the period from 1783 to 1801, it seemed to be accepted as a political axiom, license was synonymous with the freedom of the press. "Nothing in the history of the time is so startling as its (the press) coarseness and cruelty, its venomous vigor of invective, its contempt of all that should be sacred in political warfare and private life." Street brawls with fists and pistols, duels and murders were not infrequent. Everybody in Philadelphia, the then seat of government, went armed. Senators and representatives of the opposing parties took pains to avoid each other on the streets, for fear they might have to tip their hats to their political enemies; and it is said Jefferson, who was Vice-president from 1797 to 1801, often took a roundabout way from the Senate chamber to his rooms, in order to escape insult from his political foes. Mr. Alexander Dallas, in a speech in Duane's case, tried at Philadelphia in 1800, which grew out of the agitation for the repeal of the Alien and Sedition Laws, used this language: "There were two periods when every one wore weapons of defense from necessity. The first, when the police were so defective that robberies were

constant, and self-protection became necessary through the defects of the law. The second, when political fury rose to such a height, as in 1785–6, that it no longer became a question of defense against robbers, but against political opponents." In 1797, there were, probably, in the United States, two hundred newspapers published. Twenty or twenty-five of these opposed Adams's administration, with unexampled bitterness; and they, being edited mostly by the exiles or emissaries of foreign lands, a hostile feeling was aroused, not only against the press, but also against the aliens. The most prominent among these exiles or aliens of foreign lands, who published newspapers in this country, during Adams's administration, were James T. Callender of Richmond, Va., Benjamin Franklin Bache, a son-in-law of Dr. Benjamin Franklin, Thomas Cooper, and Matthew Lyon. In 1793, Philip Freneau, a Frenchman, published the *National Gazette* at Philadelphia; and though he was a clerk in the State Department, under Mr. Jefferson, he attacked President Washington and his policies with much vehemence, and even malice. President Washington retired from office on the fourth of March, 1797; and on the next day, Bache, in his paper, *The Aurora*, published at Philadelphia, had this to say about that event: "The man, who is the source of all the misfortunes of our country, is this day reduced to a level with his fellow-citizens, and is now no longer possessed of the power to multiply evils upon the

United States. If ever there was a period for rejoicing, this is the moment. All hearts, in unison with freedom and the happiness of the people, ought to beat high in exultation that the name of Washington, on this day, ceased to give currency to political iniquity and legalized corruption." This publication so incensed some of the veterans of the Revolution, who had served under Washington, that they demolished the office of *The Aurora* and threw its types and presses into the streets, and otherwise expressed their indignation. The agitation at once commenced for some repressive measures for the suppression of incendiary and seditious publications against the President and those high in authority, which was kept up till the summer of 1798. There being a majority for the administration in both Houses, Congress lashed into fury by "the X Y Z Correspondence" and the contemptuous conduct of France towards our nation, and by the scurrilous and malicious attacks of the opposition papers, on Washington, Adams and others, in a moment of weakness, enacted first the Alien Law, June 25, and then the Sedition Law, July 14, 1798.

The Alien Law invested the President of the United States with the power of ordering "all such aliens as he should judge dangerous to the peace and safety of the United States, or should have any reasonable grounds to suspect, were concerned in any treasonable or any secret machinations against the gov-

ernment thereof, to depart out of the territory of the United States, within such time as should be expressed in such order," and it was further provided that if such order was not complied with, the parties should be judged guilty of an offense, be imprisoned for a term not exceeding three years, and be incapacitated for subsequent citizenship; and in case war should be declared, the President was authorized to apprehend and remove the subjects of the belligerent powers. *This act, by its own terms, expired June 25, 1800.*

The Sedition Act provided, "That if any person shall write, print, utter, publish * * * any false, scandalous and malicious writing or writings against the government of the United States or either House of Congress or the President, with the intent to defame said government, or either House of Congress or the President; to bring them into contempt or disrepute; to excite against them, or any of them, the hatred of the good people of the United States; or to stir up sedition within the United States; or to incite any unlawful combinations therein for opposing or resisting a law of the United States or any act of the President done in pursuance of any such act, or of the powers vested by the Constitution; or to resist, oppose or defeat any such law or act," upon conviction should be fined not exceeding two thousand dollars and imprisoned not exceeding two years. It was provided, however, that the accused might give in evidence the truth of the charges

against him and that the jury should be the judges of the law and the fact under the direction of the court. This provision in this otherwise odious law embodies the principle for which Zenger and Bradford contended, and marks at that early day the steady progress of liberty.

This act, by its own terms, expired on the third day of March, 1801.

The Alien and Sedition Laws were resisted by the whole power of the Republican party, before as well as after their passage, not because it justified the slandering or libeling of the President and Congress and the government, but because it condemned the interference of the national government in regard to the freedom of the press or of religion. That party held that the States retained the right to determine "*how far the licentiousness of speech or the press may be forbidden without lessening their useful freedom and how those abuses which cannot be separated from their use should be tolerated rather than destroy the use.*" Here again we see the contest was about the manner of restraining the press rather than its unrestrained freedom.

The press had been vituperative and vindictive prior to the passage of these laws but they made it worse. "The aliens became more fractious and the seditious more scurrilous, and the result was the government found itself impudently bullied by those it attempted to chastise. It was reserved for later times

to demonstrate that after all, a press the most unfettered is a press the most restrained."

Another thing that made these laws obnoxious was they were substantial copies of English statutes on the same subjects, passed in 1794, and because they seemed to follow the laws of England and the European monarchies in removing our chief officials from the region of criticism; and the hatred of England was utilized by the Republicans to intensify the feeling of hostility against the authors of these laws.

In 1798, the Virginia legislature passed resolutions declaring the Alien and Sedition Laws unconstitutional and that the States, in case Congress by its legislation, exceeded its constitutional powers, were the judges as well of those powers, as of the remedy when such powers were exceeded; and Kentucky, in the same month, adopted a set of resolutions, written by Mr. Jefferson, which declared these laws unconstitutional and that each State, in the last resort, had an equal right to judge for itself as well of infractions of the Constitution as of the mode and measure of redress.

The Virginia and Kentucky resolutions were sent to the other States and their indorsement and approval asked. Delaware passed a resolution declaring that the resolutions were unfit for consideration even. Rhode Island and Massachusetts answered that they had no right, as States, to resist Federal legislation, but the final arbiter, as

to the constitutionality of acts of Congress was in the Supreme Court of the United States. Both States, however, thought the Alien and Sedition Laws not only constitutional, but at the same time highly necessary. Connecticut refused to concur in the resolutions because it considered the acts were constitutional and proper; New Hampshire refused to give an opinion because it claimed no authority to do so, but it intimated the acts were constitutional; Vermont thought the Supreme Court the final arbiter; New York regarded the resolutions as inflammatory and pernicious and refused to give an opinion on the constitutionality of these laws as that prerogative was not within its province. The other States made no reply. In 1799 the States of Virginia and Kentucky considered the answers to their resolutions and reaffirmed their original resolutions with emphasis and with some important additions. For instance, Kentucky asserted the doctrine of nullification, which became a subject of political agitation in after years. These resolutions, while not using the word "secession," contained the principle of secession as they were afterwards construed by all parties, and as stated above, the Southern States attempted to secede in 1861 and the Civil War and the abolition of slavery followed and the doctrine of secession was eliminated from our government forever by the arbitrament of the sword.

There is but little question that Adams, except for the Alien and Sedition Laws, would

have been re-elected President in 1800 for he had the support of one hundred and eighty out of the two hundred newspapers then published, and his vigorous measures against the domineering insults of France in 1798 had turned the tide in his favor, and it had become manifest long before the election that France was not going to establish a republic at all but was drifting back to the worst of despotisms, and hence there would have been no sympathy for her in November, 1800, that could have operated favorably to his opponent. But it seems the fates were against Adams. France, seeing that we were determined to defend our honor, yielded and there was no war; and to make Adams' folly, in a political sense, more conspicuous, there were several prosecutions prior to and during the Presidential campaign of 1800 for treason and for libel against the President, which, not so much for the matter as the manner of the prosecutions, created much popular indignation and gave the Republican party, headed by Mr. Jefferson, an opportunity not only to deny the constitutionality of these laws, but also to appear before the people as the especial champion of the freedom of the press. Adams was defeated and the Republican party put in power, which it retained with but slight interruptions for sixty years. The course of administration was thus changed and it would be a profitless task to speculate as to "what might have been" had the change not then occurred. It is enough for us to know what has been.

APPENDIX D.

BATTLES FOR THE FREEDOM OF THE PRESS — THE ALIEN AND SEDITION LAWS.

MATTHEW LYON'S CASE.

The first prosecution under the libel clause of the Sedition Law was that of Matthew Lyon, of Rutland, Vermont.

Lyon came over here from Ireland in 1755, poor and penniless, and as the custom was then, he was sold for a time to pay his passage money, and Mr. Liversworth of Cambridge, Massachusetts, became the purchaser, the purchase price being "a pair of three-year-old bull stags." Liversworth took him to Vermont where he served out his time. He picked up some education. He was made a corporal in the army under Gates, but without leave, went home for Thanksgiving one year, for which he was cashiered, but was reinstated next year and made paymaster in the army, which position he soon gave up on account of a squabble with another officer. He went to Fair Haven and engaged in paper making, printing, etc. — was given permission to raise six hundred bushels of wheat by a lottery — wheat then being the standard of values. He published "The Scourge of Aristocracy and Repository of Important Political Truth," on paper made by himself — married Governor Chittenden's daughter — denounced the Society of the Cincinnati in his paper, and was elected to Congress in

1796. The *Porcupine Gazette*, June 6, 1797, had this to say of him: —

"*The Lyon of Vermont.* — This singular animal is said to have been caught in the bogs of Hybernia, and when a whelp, transported to America; curiosity induced a New Yorker to buy him, and moving into the country afterwards, exchanged him for a yoke of young bulls with a Vermontese. He was petted by the neighbors of Governor Crittenden and soon became so domesticated that a daughter of his Excellency would stroke and play with him as a monkey. He differs from the African Lyon, is more clamorous and less magnanimous. His pelt resembles more the wolf or the tiger and his gestures bear a remarkable resemblance to the bear. This may, however, be due to his having been in the habit of associating with that species of wild beasts on the mountains; he is carnivorous but not very ferocious — has never been detected in having attacked a gentleman, but report says he will beat women. He was brought to this city (Philadelphia) in a wagon, and has several days exposed himself to the public. It has been motioned to cage him as he has discovered so much uneasiness at going with the crowd. Many gentlemen who have seen him do not hesitate to declare that they think him a most extraordinary beast."

Before the log fire in the House of Representatives at Philadelphia, he and Roger Griswald had two fights over his having been

cashiered by Gates, which led to motions in the House to expel both, but they failed as to both.

On the 20th day of June, 1798, and it must here be remembered that this was before the passage of the Sedition Law, he wrote a letter which was published in the Vermont *Journal* at Windsor, Vt., on the 23rd day of July, 1798, this being after the passage of the Sedition Law. In this letter, he stated: "As to the executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness and the accommodation of the people, that executive shall have my zealous and uniform support; but whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in the continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice; when I shall behold men of real merit daily turned out of office, for no other cause but independency of sentiment; when I shall see men of firmness, merit, years, ability, and experience discarded in their applications for office for fear they possess that independence, and men of meanness preferred for the ease with which they take up and advocate opinions, of the consequences of which they know but little — when I see the sacred name of religion employed as the State engine to make mankind hate and persecute one another, I shall not be their humble advocate."

In the same paper was published a letter

which purported to have been written by a French diplomat. This letter is known as the Barlow letter but it has been charged that it was written by Lyon himself. The letter was supposed to reflect the views of the French republic in regard to our government. It stated: "The misunderstanding between the two governments (France and the United States) has become extremely alarming; confidence is completely destroyed, mistrusts, jealousies, and the disposition to a wrong attribution of motives, are so apparent as to require the utmost caution in every word and action that are to come from your executive. I mean if your object is to avoid hostilities. Had this truth been understood with you before the recall of Monroe, before the coming and second coming of Pinckney; had it guided the pens that wrote the bullying speech of your President, and the stupid answer of your Senate, at the opening of Congress in November last, I should probably have no occasion to address you this letter. But when we found him borrowing the language of Edmund Burke, and telling the world that although he should succeed in treating with the French, there was no dependence to be placed in any of their engagements, that their religion and their morality were at an end, that they would turn pirates and plunderers and it would be necessary to be perpetually armed against them, though you were at peace; we wondered that the answer of both Houses had not been an order to send him to the madhouse. Instead

of this, the Senate has echoed the speech with more servility than even George III experienced from either House of Parliament." Lyon was indicted, October 5, 1798, for publishing these two letters, it being charged that he published them " with the intent to stir up sedition and bring the President and Congress of the United States into contempt." He was tried before Judge Paterson, an Associate Justice of the Supreme Court, and one circumstance took place which deserves special mention. He acted as his own attorney and during the trial, in order to prove the truth of the charge in the letters, he asked the presiding judge if he knew Mr. Adams and if he did not think Mr. Adams was an aristocrat. The judge, while on the bench, stated that he had been tolerably intimate with the President and that he had never seen anything in his conduct that indicated that he was an aristocrat. Lyon was convicted and his punishment fixed at a fine of one thousand dollars and imprisonment in jail four months. He paid his fine and served out his time in jail. While in jail he was re-elected to Congress. It was said that his imprisonment was enforced by a rigor that excited the indignation of the people, but he would not try to escape. In fact his enemies charged that he desired to make a martyr of himself on account of this prosecution and imprisonment. His wife visited him while in jail and she insisted he should neither escape nor accept a pardon from the President, if it should be

tendered him. After serving his time out, he went to Philadelphia and took his seat in the House. A motion was made to expel him but it failed because there were not two-thirds in favor of his expulsion, the vote standing forty-eight against him and forty-five for him. He declined an election in 1800, and in 1801 he moved to Kentucky. In 1803, he was sent to Congress from Kentucky and found himself a hero, the majority in the House being then in his favor. He served as a member from Kentucky until 1811, when he was appointed factor for the Cherokee Indians by the President, and he moved west of the Mississippi river. It seems he was a man of great physical endurance, for he made a trip from Arkansas to Kentucky and Washington on horseback, and in the last years of his life, he took a raft to New Orleans, in doing which he suffered a great deal. He died at Spadre Bluff, Ark., August 1, 1822, at the age of seventy-seven. In 1840, Congress refunded the fine which had been imposed upon him in 1798, with interest, to his relatives, at the same time condemning the law under which he had been convicted.

The case of Lyon has some resemblance, in many of its aspects, to that of John Wilkes in England in 1769. Wilkes was convicted in the King's Bench, on the third day of February, 1769, "for having printed and published a seditious libel and three obscene and impius libels," and was fined and imprisoned. He, being a member of the House of Com-

mons, was expelled because of this conviction, but the freeholders of Middlesex re-elected him and he was again expelled. The freeholders again elected him and he was again expelled. These elections were without opposition. On the 13th of April, 1769, a new election was ordered and Mr. Lutterel had the backbone to become an opponent of Mr. Wilkes, but Wilkes received 1,143 votes and Lutterel 296. The sheriff returned Mr. Wilkes, but the House determined that Mr. Lutterel was duly elected on the ground that Wilkes was not eligible. There was an attempt to expel Lyon from the House, but it failed. The Federalists, however all voted for his expulsion and thus increased the suspicion, that they favored the English policies and were disposed to follow English precedents. Otherwise the Lyon case did not have much political influence, as his trial before Judge Paterson was conducted with great calmness and decorum, and there was no indignation aroused on account of the methods adopted in his prosecution.

APPENDIX E.

THE BATTLES FOR THE FREEDOM OF THE PRESS — THE ALIEN AND SEDITION LAWS.

ANTHONY HASWELL'S CASE. — Another prosecution under the Sedition Law may be cited as an echo of the Lyon case, and that is the one against Anthony Haswell. Mr. Haswell was born in Portsmouth, Eng., in 1756. He was at an early age connected with the English navy but, disliking a seafaring life, he found his way to this country, coming first to Philadelphia where a sister of his lived. He engaged in the Continental service in defense of American liberty during the Revolutionary War and periled his life at the battle of Monmouth. After the war, he located at Bennington in what is now Vermont, and in 1783, he, with one or two other parties, established the Vermont *Gazette* which he and his descendents continued to publish up to 1850. His paper took an active part in the controversy between New York and New Hampshire, respecting the right of jurisdiction over the territory included in what was known as the "New Hampshire Grants." By the time the Federal Constitution was adopted, this controversy had been closed and the State of Vermont was admitted to the Union, March 4, 1791. Previous to the admission of the State, post offices had been established at various places in it, and Mr. Haswell was appointed Postmaster General for the "Grants." During Washington's

administrations, there existed comparatively little diversity of political opinion in Vermont but when the Presidential election of 1796 approached, the people there marshaled themselves into opposing political camps, which then divided the country. Mr. Haswell attached himself to the Republican or Democratic party and became its staunch supporter. He was indicted in 1799 for the publication in his paper of the following notice: —

"*To the Enemies of Political Persecution in the Western District of Vermont.* — Your representative (Matthew Lyon) is holden by the oppressive hand of usurped power in a loathsome prison, deprived almost of the right of reason, suffering all the indignities which can be heaped upon him by a hard-hearted savage who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims. But in spite of Fitch (the marshal) and to their sorrow, time will pass away; the month of February will arrive and will it bring liberty to the defender of your rights? No. Without exertion, it will not. Eleven hundred dollars must be paid for his ransom. This money it is impossible for Col. Lyon to raise in any ordinary way. A contribution is talked of, but this is an uncertain, humiliating and precarious method. Col. Lyon has adopted a plan which accords with his feelings, and he hopes it may be with those of his friends. The plan is this: He has purchased a grant for a lottery, upon which he has formed

a scheme whereby he designs to sell tickets for money to the amount of his fine and consequent losses; and pay the prizes in land, houses, and such other property as he has to dispose of. May we not hope that this amount may answer the desired purpose, and that our representative shall not languish a day in prison for want of money after the measure of Federal injustice is filled up?"

This article was published by the agents of the lottery scheme. Haswell also inserted in his paper, right under the above notice, an item taken from the *Aurora*, as follows: "At the same time the administration publicly notified that Tories, men who had fought against our independence, who had shared in the desolation of our homes and the abuse of our wives and daughters, were men who were worthy of the confidence of our government." He was tried before Judge Paterson at Windsor, Vt., May 5, 1800 — was convicted, and his punishment fixed at a fine of two hundred dollars and imprisonment in jail two months. The following is an account of Mr. Haswell's treatment prior to and after his conviction:—

"He was arrested at night and notified to prepare for a journey to Rutland early in the morning. Accordingly, at a very early hour, Mr. Haswell, although in very poor health, and totally unaccustomed to riding, was compelled to mount a horse and ride sixty miles through the rain on a cold day in October, to the jail at Rutland. Here he was thrown into a filthy prison at midnight, not-

withstanding his entreaties to be permitted to dry his clothes, which were saturated with the rain, and to repose himself in decent quarters after the fatigue of the journey. Several of the most responsible men in Rutland offered any security the marshal might demand to induce him to grant these requests, but in vain. The prisoner was thrown into the prison and never afterwards recovered entirely from the shock, thus given to his health. From Rutland, he was taken, next morning, to Windsor, where he was to be tried. His sentence was rigidly carried out, and he was remanded to the jail at Bennington to fulfill his imprisonment. At the expiration of his sentence an immense concourse of people from the neighboring county assembled to welcome him back to liberty and to signalize their disapprobation of his imprisonment. He marched forth from his quarters at the jail to the tune of Yankee Doodle, played by a band, while the discharge of cannon signified the general satisfaction at his release."

This account of Haswell's treatment is probably very much exaggerated, but it was published far and wide and had the desired effect to inflame the public mind against the administration during the Presidential campaign. Nothing particularly noteworthy took place at the trial. Haswell offered proof to the jury as to the inhuman treatment of Lyon, by the jailer, as a justification of the charge in the indictment, but the jury, under the charge of the court, found against him on that point.

Mr. Haswell died May 22, 1816, at the age of sixty years. In 1844, Congress passed a law, refunding to his representatives the amount of the fine imposed on him in this case, with interest for forty years.

In extenuation of the conduct of Lyon in operating a lottery to raise money to pay his fine and the costs of the prosecution and of the indorsement of that method by his friends, it may be stated that at that time, many, probably all of the States, authorized lotteries to raise money for public and private purposes. That was a favorite means of raising money to found schools and asylums, to build bridges, to make roads, etc., and England raised a large part of her annual revenue by government lottery. The immorality and viciousness of lotteries were not fully recognized in this country and Great Britain till about 1820–30. Even as late as 1826, at Jefferson's own request, Congress authorized him to dispose of his property by a lottery in order to enable him to pay his debts. Washinton City, under laws of Congress at that time, operated a lottery to raise money for municipal purposes, and on February 22, 1827, authorized that city to include in its lottery scheme the lands of Mr. Jefferson. So it ought not to surprise anyone that in 1799 a notice was published stating that a Congressman had obtained the grant of a lottery to raise money to pay his ransom, as he called it, and which plan, it was stated, accorded with his feelings and he hoped that it might accord with those of his friends.

APPENDIX F.

THE BATTLES FOR THE FREEDOM OF THE PRESS — THE ALIEN AND SEDITION LAWS.

Cooper's Case. — Another case arising under the Sedition Law was that of Thomas Cooper, and as this case grew out of one of the most bitter controversies of the time and had much influence on the course of political opinion in the campaign of 1800, it will be appropriate to give a brief statement showing the circumstances out of which it grew. One Thomas Nash, alias Jonathon Robbins, was arrested at Charleston, S. C., on a warrant issued by Judge Bee, on suspicion of having been concerned in a mutiny on board the British frigate Hermione in 1791, which ended in the murder of the principal officers and the carrying of the frigate into the Spanish port, La Guyra, in Venezuela, by the mutineers, where they sold the frigate and its cargo to Spanish subjects. Nash, alias Robbins, escaped to the United States and the British government demanded his surrender under the twenty-seventh article of the treaty between the United States and herself. Affidavits were made, charging Nash, alias Robbins, with being a participator in the mutiny and the sale of the ship and its cargo. He filed an affidavit in his own behalf, stating that he was born in Danbury, Connecticut; that he was pressed into the British service off of the brig Betsy of New York, commanded by Captain White and bound for St. Nicholas Mole,

by the British frigate Hermione, commanded by Captain Wilkinson, and was there detained contrary to his will in the service of the British nation, until the said vessel was captured by her crew, and that he gave no assistance to such capture. The question whether he ought to be extradited, under the circumstances, came before Judge Bee, in June, 1799, on writ of habeas corpus, and while that question was pending before him, the Secretary of State addressed a letter to the judge, informing him that the application had been made by the British minister, Liston, for the extradition of the prisoner under the treaty, and stating that the President had authorized him (the Secretary of State) to communicate to the judge "his advice and request," that Thomas Nash (Jonathon Robbins) be delivered to the consul or other agent of Great Britain. On the first day of July, 1797, upon a hearing of the habeas corpus, the judge decided that he ought to be delivered up to the British authorities, which was accordingly done, and he was taken to Jamaica, tried for the crime of murder, and executed. The Republican press attacked the administration with great fury for extraditing Robbins on two grounds, first, that a murder committed on the high seas was triable here, though committed on a foreign vessel; and, second, the interference of Adams with the proceedings in court.

Mr. Cooper was born in London in 1759 and was educated at Oxford. He studied law

and was admitted to the bar. He also took a course in the sciences and became a great chemist. Soon after his advent to the bar in 1792, he accepted an ambassadorship from the Democratic club in England to a club in France, Mr. Watt of steam engine fame signing his credentials. For this, Watt and Cooper were both assailed in the House of Commons by Mr. Burke. Mr. Cooper returned to England in the course of a year or two and he replied to Burke's strictures in a pamphlet, "which made up for the want of vivacity of its style by the excessive inflammation of its temper." He finally, in company with Dr. Priestley, came to this country. He seemed to be impressed with the idea, on landing on our shores, that the government would soon demand his services and he applied to President Adams for a position, which was not given him, whereupon he became violently opposed to the Federal party. In December, 1799, he being then the editor of the Sunbury and Northumberland *Gazette*, published an article in which he undertook to explain why he had asked Mr. Adams for an office, which article is as follows:—

"Nor did I see any impropriety in making this request of Mr. Adams. At that time, he had just entered into office; he was hardly in * * * the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a * * * permanent navy nor threatened under his

auspices with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace, while the unnecessary violence of official expressions might justly have provoked a war. Mr. Adams had not yet projected his embassies to Prussia, Russia, and the Sublime Porte, nor had he yet interfered as President of the United States to influence the decisions of the court of justice — a stretch of authority which the monarch of Great Britain would have shrunk from — an interference without precedent, against law and against mercy. This melancholy case of Jonathon Robbins, a native citizen of America, forcibly impressed by the British and delivered up with the advice of Mr. Adams to the mock trial of the British court-martial, had not yet astonished the Republican citizens of a free country; a case too little known but of which the people ought to be fully apprised, and they shall be."

For publishing this article, Mr. Cooper was arrested at Philadelphia in April, 1800, on an information filed by the District Attorney before Mr. Justice Samuel Chase and Mr. Justice Peters. He was tried and convicted and his punishment fixed at a fine of four hundred dollars and imprisonment in jail six months. He paid the fine and served out his time in jail. Judge Chase, in his charge to the jury in this case, dwelt at considerable length on each item of the publication which was the basis of the charge and insisted that

the object of Mr. Cooper was to bring the President into contempt before the people of the United States. In order to show the great contrast between the views entertained a hundred years age and now, in regard to the criticism of the President, a part of the charge of Judge Chase to the jury is given. "In this allusion," says the Judge, "to Jonathon Robbins, he expressly tells you this is 'a case too little known, but of which the people ought to be fully apprised before the election, and they shall be.' Here then the evident design of the traverser (Cooper) was to arouse the people against the President so as to inflame their minds against him at the next election. I think it right to explain this to you because it proves that the traverser *was actuated by improper motives* to make this charge against the President." But the judge was liberal enough in the trial of this case to allow Mr. Cooper to read public documents to the jury to prove the truth of the charge, but Judge Chase was too much bent on conviction to allow him to escape.

This case illustrates the folly of the government's attempt to suppress adverse criticism, though it be unjust and even malicious. The President had been criticised for the extradition of Robbins prior to this trial but this made it worse. The Robbins case was made a political issue and in the winter of 1800, it was introduced into the House of Representatives by resolution condemning Mr. Adams and a long debate followed. A

substitute for the condemning resolutions was offered approving the action of the President. The debates on this question were very able and exciting and were participated in against the administration by Livingston, Gallatin, and others and in favor of the administration by John Marshall, then a member of the House, who afterwards became the great Chief Justice of the Supreme Court of the United State, Bayard, and others. The condemnatory resolutions were finally defeated by a vote of sixty-two to thirty-five and there the matter ended, the approving resolutions never having been voted on. In the fall of 1800, a handbill was issued, inclosed in black lines like the "coffin handbills" of the times and was posted throughout the country as follows: —

"Reader, if thou art a Christian and a freeman, consider by what unexampled causes it has become necessary to construct this monument of national degradation and individual injustice which is erected to commemorate a citizen of the United States, Jonathon Robbins, mariner and native of Danbury in the pious and industrious State of Connecticut, who under the Presidency of John Adams and by his advice, when Timothy Pickering was Secretary of State, was delivered up to the British government by whom he was ignominiously put to death because he was an American citizen; who after having been barbarously forced into the service of his country's worst enemy and forced to fight

against his conscience and his country on board the British frigate Hermione, commanded by a monster of the name of Pigot, bravely asserted his right to freedom as a man and boldly extricated himself from the bondage of his tyrannical oppressors, after devoting them to merited destruction. If you are seamen, pause — cast your eyes into your soul and ask if you had been as Robbins was, what would you have done? What ought you to do? And look at Robbins hanging at a British yard-arm; he was your comrade and as true a tar as ever strapped block; he was your fellow-citizen and as brave a heart as bled at Lexington or Trenton; like you, he was a member of a republic, proud of past glories and boastful of national honor, virtue, and independence; like him, you one day may be trussed up to satiate British vengeance, your heinous crime daring to prefer danger and death to a base bondage. Alas poor Robbins! Alas poor liberty! Alas poor humbled and degenerate country!"

Thus it seemed that every effort made by the Adams' administration to suppress criticism only added fuel to the flames; and this handbill is a mountain torrent as compared to the article Cooper published and for which he was convicted. There is very little doubt, as Mr. John Marshall showed very clearly in his speech, that President Adams was entirely right in assuming that the duty to extradite those charged with crime devolved on him, and that the crime with which Robbins was

charged, having been committed on board a British frigate, was exclusively within the jurisdiction of the British government; but the letter of the Secretary of State to the judge while he had under consideration the question of the validity of the extradition papers, was, to say the very least, very indiscreet, and it gave the political opponents of the administration the opportunity to make political capital out of the case. Mr. Cooper, after serving his time out in jail and after the inauguration of President Jefferson, became an object of much interest on account of his sufferings and he was regarded by the Republicans as a great martyr. He was appointed a commissioner to settle the Luzerne difficulties in Pennsylvania — a duty he discharged with remarkable skill and success. Then he was appointed by Gov. Thomas McKean, the presiding judge of the eighth circuit of the State. He had untiring industry, philosophical attainments, and a courageous temper but he was a failure as a judge. He had not what the lawyers call "The judicial temperament." He was so severe and oftentimes whimsical in his office, especially in keeping order in the court-room, that charges were brought against him, before the legislature in 1811, for his impeachment. One of these charges was that while on the bench in open court, he stated that the Presbyterian and Quaker professions of faith were, "all damned nonsense." He was also charged with corrupt practices. The legislature examined

into the matter and, while not finding anything in the charges that justified articles of impeachment, adopted an address to the governor to remove him, which was done. Here again we must note the strange vicissitudes of a partisan. This attempt to impeach Cooper was made by the same party with which he had been affiliated and the same party that had instigated the impeachment of Chase. Here again, he showed his fickleness and turned against the Republican party. Like Callender, he felt a natural disgust when he found that under Jefferson many men were put ahead of him who had not received the honor of martyrdom under Mr. Adams. In 1811, he said he had gone to France in 1792 as an enthusiast and returned in disgust, and after seventeen years spent here, he had found that a Democratic government was not as perfect in practice as it was beautiful in theory.

Mr. Cooper's fine chemical acquirements, which during all the storms of his eventful life had never been submerged, now gave him a safe retreat. He was first placed in a philosophical professorship in Dickenson's College and afterwards in a highly honorable post in the University of Pennsylvania, which he finally abandoned for the Chemical Chair in Columbia College, South Carolina, of which he soon became president. He took a bold part in the nullification controversy in 1832, issuing documents of the most ultra States' rights tone which showed that he had

lost nothing of the fire of the pamphleteer of 1795–1800. He died in 1840 when engaged in revising the South Carolina statutes, a duty charged on him by the legislature, after having published besides numberless tracts on politics, divinity, and metaphysics, a treatise on the bankrupt laws, a translation of Justinian, a treatise on political economy, a manual of chemistry, as well as a general compendium of useful information.

In 1840 Congress refunded to him the fine that he had paid, with interest thereon.

APPENDIX G.

BATTLES FOR THE FREEDOM OF THE PRESS — THE ALIEN AND SEDITION LAWS.

CALLENDER'S CASE. — The most picturesque and dramatic case arising under the Sedition Law was that of James Thompson Callender, on account of the actors and the conduct of the trial as well as on account of the law under which the trial was had. Callender was a Scotchman, and wrote a work called "The Political Progress of Great Britain," on account of which he had to leave England. He came to this country and took charge of the Richmond *Examiner*. He was a fiery Republican, and in the early part of the campaign of 1800, he wrote a pamphlet entitled "The Prospect Before Us," which was circulated as a campaign document against the administration and in favor of Mr. Jefferson. Samuel Chase, an Associate Justice of the Supreme Court of the United States, who had tried the Cooper case at Philadelphia in April, 1800, and who lived at Baltimore, went to Richmond in May, 1800, and it was alleged that before leaving home he obtained a copy of the "Prospect Before Us," and remarked that he would go down to Richmond and teach the lawyers there the difference between the licentiousness and the liberty of the press, and even before he reached Richmond, affidavits were made setting out his remarks and were circulated throughout the country, and threats were then

made that Mr. Justice Chase would be impeached. When the justice arrived at the court house in Richmond, he found it filled with the most eminent lawyers of Virginia, and expectation was at a high pitch. Callender was indicted in due time by the grand jury, and arraigned before Mr. Justice Chase for trial. The most important parts of the "Prospect Before Us" which were made the basis of the charge in the indictment were as follows: —

"The reign of Mr. Adams has been one continued tempest of malignant passions. As President, he has never opened his lips or lifted his pen without threatening and scolding; the grand object of his administration has been to exasperate the rage of contending parties, to calumniate and destroy every man who differs from his opinions. Mr. Adams has labored with melancholy success to break up the bonds of social affection and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life. * * * Adams and Washington have since been shaping a series of these paper jobbers into judges and embassadors, as their whole courage lies in want of shame; these poltroons, without risking a manly and intelligible defense of their own meanness, raise an affected yelp against the corruption of the French Directory, as if any corruption would be more venal, more notorious, more execrated than their own. The object of Mr. Adams was to commence a

French war, professedly for the sake of supporting American commerce, but in reality for the sake of yoking into alliance with the British tyrant * * * You will choose between that man whose life is unspotted by crime and that man whose hands are reeking with the blood of the poor, friendless Connecticut sailor. I see the tear of indignation starting on your cheek! You anticipate the name of John Adams. Every feature in the conduct of Mr. Adams forms a distinct and additional evidence that he was determined, at all events, to embroil us in war with France. Mr. Adams has only completed the scene of ignominy which Mr. Washington began * * * He was a professed aristocrat; he had proved faithful and serviceable to the British interest * * * By sending these embassadors to Paris, Mr. Adams and his British faction designed to do nothing but mischief. In that paper with all the cowardly insolence arising from his assurance of personal safety, but without the propriety or sublimity of Homer's Achilles, this hoary-headed incendiary, this libeler of the government of Virginia, howls out to arms! then to arms! * * * When a chief magistrate, both in his speeches and newspapers, is constantly reviling France, he can neither expect nor desire to live long in peace with her. Take your choice then between Adams, war and beggary, and Jefferson, peace and competency."

Mr. Justice Chase did not conduct this

trial with as much fairness and calmness as he did that of Cooper at Philadelphia. He had tried the case of John Fries, one of the Northampton insurgents, at Philadelphia, and had aroused a great deal of indignation among the members of the bar on account of the methods he adopted, and he was very severely criticised for this and it is charged that the trial of Fries and of Cooper had excited him to a high pitch, and when he came to the trial of Callender, he seems to have lost the judicial temper entirely and assumed that of an excited partisan of Mr. Adams. Mr. Carson, in his history of the Supreme Court of the United States, says this of Chase: "Irascible, vain, overbearing and sometimes tyrannical, but learned, able, patriotic and of spotless honor and with an instinct for tumult and a faculty for promoting insurrections at the bar, moving perpetually with the mob at his heels, a suite from which, as Dr. Wharton says, 'even the judicial office could not separate him:' he trusted, with general success, to his fearlessness to extricate himself from the disorders which his imprudence fomented." Such eminent counsel as Hay, Nicholas, and William Wirt, appeared for Callender, and the conduct of the trial and the rulings of the judge were so contrary to what is ordinarily done, that the indignation of these lawyers and the whole public were intensely excited. The newspapers of the day, for the first time, published the speeches of the lawyers, the evi-

dence, and the rulings of the court in extenso and this created the wildest excitement throughout the whole country.

The statement in the pamphlet that the hands of Mr. Adams were "reeking with the blood of the poor, friendless Connecticut sailor," refers, of course, to Jonathon Robbins.

In this case, as indeed in all the cases arising under the Sedition Law, the defendant insisted that that law was unconstitutional and void. Mr. William Wirt, one of the most eminent and influential lawyers of the period, in his defense of Callender, made one remarkable point. It was then a mooted question whether even the courts were authorized under our Constitution to declare an act of Congress unconstitutional, but Mr. Wirt took several steps in advance of that proposition and argued that the *jury* had the power and right to do that. He persisted in this argument to such an extent that the court ordered him to take his seat, holding first, that the law was constitutional, and second, that it was not within the province of the jury to pass on such a question and he emphatically refused to permit Mr. Wirt to argue that point to the jury. During the trial, all three of the defendant's attorneys were successively ordered by the court to take their seats. There can be but little doubt that the defense in this case so planned in advance and carried that plan out to make this trial an issue in the then pending campaign

and they succeeded to their entire satisfaction. Callender was convicted and his punishment fixed at a fine of two hundred dollars and imprisonment in jail for nine months.

By the time this trial was ended, Mr. Adams and his friends evidently saw that their repressive measures were making things worse and there was no important trial under the law after that. March 3, 1801, this odious law expired according to its own terms and the spell was broken. The Adams administration for sixteen months had thoroughly tested the efficiency of repressive measures to prevent adverse criticism and had ignominiously failed. The more it prosecuted, the more coarse and vituperative the criticism became, and on March 4, 1801, Mr. Adams was so angry and felt so humiliated, not so much because he had been defeated as on account of the causes of his defeat, that he and his wife got into a carriage and left Washington without waiting to attend or see Mr. Jefferson's inauguration. A change came over the spirit of the American people in a day. March 3 was very different from March 4, 1801. Mr. Jefferson, after having carried on a campaign, unexampled for its bitterness and personal animosities, in his inaugural address announced, that, "we are all Republicans — we are all Federalists."

But now it came Jefferson's turn to have trouble with the press. He pardoned Callender as he did all others who were still in prison or under indictment, after his inaugu-

ration. Mrs. Adams in a letter to Mr. Jefferson had accused him of liberating "a wretch who was suffering for a libel against Mr. Adams" and replying to that charge in a letter to Mrs. Adams under date of July 22, 1804, Mr. Jefferson said, "I discharged every person under punishment or prosecution under the Sedition Law, because I considered and now consider that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage as it would have been to have rescued from the fiery furnace, those cast into it for refusing to worship the image."

Callender, on his liberation, feeling he had suffered martyrdom for the Republican cause, applied to the President for the postmastership of Richmond and failing to get it, he turned against the administration and became its bitter foe. He came in charge of a paper of Richmond called *The Recorder* and he went as far in his denunciation of Jefferson in that paper as he had gone in former years against Mr. Adams. The Federalists made use of their new-found friend and his hitherto obscure journal found its way to all parts of the country. Callender attacked Mr. Jefferson personally, accusing him of having paid for the articles he had published against Mr. Adams and for the publication of which he had been convicted of libel. He dragged the President's private character before the pub-

lic and every private act which could be tortured by any means into a vice was laid before the people. He sought in every way possible to bring his quandom friend into public contempt. His publications and allegations gave rise to the article Crosswell published, which became the basis of a charge of libel against him and Mr. Jefferson found it necessary to explain his relations with Callender, not only in his letter to Mrs. Adams, but also in one to Monroe, an account of which was given in the history of Crosswell's case.

Callender, having been made an issue in the Presidential campaign of 1800 and after having deserted his old friends and gone over to his former enemies, met a miserable death. He was found dead in the James River near Richmond, having been drowned, as it was supposed, while in a state of intoxication.

When Congress, in 1844, refunded to Haswell's representatives the fine which had been imposed on him and which he had paid, one of the most exciting and sensational chapters in American history was closed. The object lessons afforded the American people by the enforcement of the Sedition Law were so sensational and impressive and the results so disastrous to those who by means of that law tried to suppress adverse criticism of the press that no party since has even suggested a similar law. Ever since then, the criticised have deemed it wise and prudent to suffer the ills they endure rather than fly to others they know not of.

Although Jefferson and Adams had been bitter political opponents up to 1800, in after years they became very warm friends and they kept up a correspondence as long as they both lived. These two remarkable Revolutionary patriots, who had contributed so much to the glory and development of their country, both died on the same day and that on the anniversary of our independence, the fourth day of July, 1826.

Chase's Case. — As has been stated, the agitation for the impeachment of Judge Chase began before Callender was tried and it ceased not till 1804, when the majority of the Republicans in the House of Representatives became strong enough to prefer and it did prefer articles of impeachment against him and he was tried by the Senate in 1805. The principal charges contained in the impeachment articles grew out of the trial of Fries at Philadelphia and the trial of Callender, but when it came to a vote, all the charges except those connected with the Callender trial, were susbstantially ignored.

During the trial, Callender called John Taylor as a witness in his own behalf but the judge refused to permit his examination until the attorneys informed him what they expected to prove; he even required them to write out and submit to him the questions they proposed to propound to the witness, which being done and finding the object to be to prove that Adams was an aristocrat and

had advocated measures in Congress which were regarded by the Republicans as inimical to the best interests of the people, he refused to allow the witness to be examined. This ruling of his and his general conduct in regard to this point were charged in the Third Article of the Impeachment as a high misdemeanor; and eighteen senators voted him guilty on this charge and sixteen declared him not guilty. Article Four of the Impeachment charged him with rude, contemptuous and indecent behavior during the trial, and again there were eighteen senators against him to sixteen for him on this charge. There not being a majority of two-thirds in favor of his conviction, he was duly acquitted. He was thus saved, so it was thought, by reason of his age and the eminent services he had rendered the country in former years. He had stood firmly and courageously for American liberty during the dark days of the Revolutionary War; he was one of the immortal signers of the Declaration of Independence; he was a member of Congress from 1774 to 1784 and he was an appointee of Washington who made him an associate justice of the Supreme Court, January 27, 1796.

APPENDIX H.

THE BATTLE FOR THE FREEDOM OF THE PRESS IN CONGRESS—PECK'S IMPEACHMENT.

In 1826–31 arose another case which influenced national legislation on the subject of the impeachment for contempt of court, and that was the case of James H. Peck, judge of the United States District Court at St. Louis. At that time, there was a large number of cases in the courts involving the title to lands which were alleged to have been granted to private parties by the Spanish government, in the Louisiana Territory, from the time it acquired that territory from France to its cession to us in 1803. One of these cases, Julia Soulard and others against the United States, came before Judge Peck for adjudication. Luke Edward Lawless, a member of the bar of the Federal court at St. Louis, appeared as attorney for the plaintiffs in that case and Judge Peck, when he came to dispose of it, wrote a lengthy opinion and did what was then in the West, a very unusual thing, published it in the *Republican*, now the St. Louis *Republic*, in April, 1826; and Lawless, on April 8 of the same year, wrote and caused to be published in the Missouri *Advocate* and St. Louis *Enquirer*, an article signed, "A Citizen," in which the soundness of the opinion of Judge Peck was attacked, but not in offensive language. Mr. Lawless in the article stated: "Judge Peck in his opinion, it seems to me,

erred in the following assumptions as well of fact as of doctrine;" and then he gave eighteen specifications of error, some of history, some of fact and some of law, but all couched in very respectful terms. The judge took umbrage at the article, feeling that it was indefensible for a lawyer who was an officer of his court to go before the public with objections to his decision and he caused Lawless to be brought before him to answer for contempt of court. On being arraigned, Lawless insisted that the court had no jurisdiction to try him for any publication he might cause to be inserted in the newspapers, even if such publication was libelous and was calculated and intended to bring the judge into contempt or to impede or improperly influence the administration of law. He denied, however, that the article was objectionable in any sense, and said that he intended thereby no disrespect to the court, but his sole object was to present his views in which a large number of people had a deep interest and besides that, he could not have intended to influence the decision in that case because, at the time of the publication, the case had already been disposed of. The judge overruled all these points and held that the article was calculated and intended to bring him into contempt before the people and to interfere with and influence the disposition of other cases then pending before him, involving the same questions. Upon a final hearing, the judge ordered that Lawless be imprisoned twenty-four

hours and be disbarred. In December, 1826, Lawless presented to the national House of Representatives the facts in this case and asked for Peck's impeachment. Peck replied to the charges Lawless made and the matter hung fire for some cause until April 13, 1830, when the House of Representatives carried articles of impeachment against Peck by a vote of one hundred and twenty-three to forty-nine and he was arraigned upon them before the Senate as a high court of impeachment. Among the attorneys who appeared in this case were James Buchanan, afterwards President of the United States, for the prosecution, and William Wirt, for the defense, the same Wirt who had been such a conspicuous figure in the events leading up to and in the trial of Chase, in 1804–5. The trial terminated January 31, 1831, by an acquittal, the vote standing twenty-one for and twenty-two against conviction. The whole ground of the power as well as the propriety of courts punishing for contempts not committed in their immediate presence was thoroughly gone over by the ablest lawyers of the country, and it is probable Peck's acquittal resulted more from a belief of the senators that he acted in good faith in exercising jurisdiction and in holding the article in question a contempt, rather than to the fact that those who voted for him concurred in his views, especially as to the character of the article. At this day, such an article as the one Lawless published would be regarded as harmless, if not exceedingly tame.

The trial, however, made a profound impression on the whole country and on March 2, 1831, a little over one month from its termination, Congress enacted a law introduced by Mr. Buchanan, which limited and defined the power of the Federal courts to punish for contempts. It provided: "That the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts." It provided, however, that it should be a criminal offense for anyone to corruptly by threats or force to endeavor to influence, intimidate, or impede any juror, witness or officer in the discharge of his duty, or corruptly by force or threats to obstruct or impede the due administration of justice in the courts, and subjected him to an indictment.

The Supreme Court of the United States sustained the constitutionality of this act in Ex parte Robinson, 19th Wall. 505. This case arose in the United States District Court for the Western District of Arkansas in 1873.

Robinson, being a member of the bar of that court, was attached as for a contempt and was charged with having induced a witness to evade the service of process on him. After a hearing, the court disbarred him and Robinson brought the case before the Supreme Court of the United States on application for a writ of mandamus to compel the court below to restore his name to the roll of lawyers. The Supreme Court, referring to the act of March 2, 1831, said: "The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to circuit and district courts, there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence or subsequent acts extending or limiting their jurisdiction. The act of 1831 is therefore to them the law specifying the cases in which summary punishment for contempts may be inflicted. * * * As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes." The court ordered Robinson to be reinstated as a member of the bar of the court below.

So, therefore, so far as the Supreme Court

of the United States is concerned, the question whether courts created by a constitution which vests in them "all judicial power" are beyond the reach of the legislative department in respect of that judicial power, is yet an open, though, as stated by the court, a doubtful one. That august tribunal has never chosen to exercise its power to punish for contempt not committed in its presence, though many opportunities have arisen which could have been seized upon to put in operation the process of attachment for contempt, for its decisions and its judges too have been assailed in numerous cases and in a most vindictive, turbulent and, in many cases, malicious way. Hitherto the judges of that court have maintained a dignified silence and non-action, assuming, it is to be presumed, that time would vindicate them if they deserved vindication and if they did not deserve vindication, no action they could take would benefit them.

But nevertheless, one thing is apparent by the passage of the above act and that is that Congress does not believe in the exercise of the jurisdiction of the courts to punish for contempts not committed in their immediate presence, and it is made plain what its desire is even in respect of the Supreme Court itself.

APPENDIX I.

THE CONTEMPT STATUTE IN FORCE SINCE 1835— THE SECTIONS ARE THOSE OF THE REVISION OF 1899.

Sec. 1616. May Punish for Contempts. — Every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of the following acts, and no other: First, disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, willful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious or unlawful refusal of any person to be sworn as a witness, or, when sworn, the like refusal to answer any legal and proper interrogatory.

Sec. 1617. Punishment for Contempt. — Punishment for Contempt may be by fine or imprisonment in the jail of the county, where the court may be sitting, or both, in the discretion of the court; but the fine in no case shall exceed the sum of fifty dollars, nor the imprisonment ten days; and where any person shall be committed to prison for the nonpayment of any such fine, he shall be discharged at the expiration of thirty days.

Sec. 1618. May be Punished Summarily. — Contempt committed in the immediate view and presence of the court, may be punished summarily: in other cases the party charged shall be notified of the acusation and have a reasonable time to make his defense.

Sec. 1619. Commitment for Contempt. — Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstances of his offense shall be set forth in the order or warrant of commitment.

Sec. 1620. Preceding Sections Construed.— Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for contempt, for the purpose of enforcing any civil right or remedy.

Sec. 1621. Parties May Be Indicted, when.— Persons punished for contempt under the preceding provisions, shall, notwithstanding, be liable to indictment for such contempt, if the same be an indictable offense: but the court before which a conviction shall be had on such indictment shall, in forming its sentence, take into consideration the punishment before inflicted.

APPENDIX L.

STATE ex inf. CROW, Atty.-Gen., v. SHEPHERD.

(Supreme Court of Missouri, Oct. 13, 1903.)

In Banc. Proceedings for contempt by the State, on the information of Edward C. Crow, Attorney-General, against J. M. Shepherd. Defendant adjudged guilty of contempt.

The Attorney-General, for plaintiff, N. M. Bradley, and Alexander New, for defendant.

MARSHALL, J. This is an ex officio information by the Attorney-General, informing the court that the defendant, as publisher of a certain weekly newspaper at Warrensburg, Mo., called the *Standard-Herald*, on the 19th of June, 1903, published in said paper the following article: "When a citizen of Missouri stops long enough to think of the condition of affairs in his State, it is enough to chill his blood. A grand jury in Cole County has just found indictments against four members of the highest lawmaking body in the State, and the St. Louis grand jury has heard evidence within the past few months that, if it had the necessary jurisdiction, would have indicted many other members of the State Senate. The Missouri citizen has also seen the Cole County grand jury dissolved before the work mapped out for it was hardly begun, on the advice of the Attorney-General of the State. They also see the Chief Executive sitting passively at his office in the State-house, not making a move to bring to justice the men who have been proven guilty of bood-

ling in the Missouri Legislature by the St. Louis grand jury, but over whom the authorities of that city have no jurisdiction. And now, as the capsheaf of all this corruption in high places, the Supreme Court has, at the whipcrack of the Missouri Pacific Railroad, sold its soul to the corporations, and allowed Rube Oglesby to drag his wrecked frame through this life without even the pitiful remuneration of a few paltry dollars. Learned men of the law say that Rube Oglesby had the best damage suit against a corporation ever taken to the Supreme Court. This very tribunal, after reading the evidence and hearing the arguments of the attorneys, rendered a decision sustaining the judgment of the lower court, which decision was concurred in by six of the seven members of the court. This is usually the end of such cases, and the decision of a Supreme Court, once made, usually stands. But not so in the Oglesby case. Three times was this case, at the request of the railway attorneys, opened for rehearing, and three times was the judgment of the lower court sustained. But during this time, which extended over a period of several years, the legal department of this great corporation was not the only department which was busy in circumventing the defeat of the Oglesby case. The political department was very, very busy. Each election has seen the hoisting of a railway attorney to the Supreme Bench, and, when that body was to the satisfaction of the Missouri Pacific, the onslaught

to kill the Oglesby case began. A motion for a rehearing was granted, and at the hearing of the case it was reversed on an error in record of the trial court, and was sent back for retrial. That was in the early part of the year 1902. The case was tried in Sedalia before Circuit Judge Longan, one of the ablest jurists in the State, and we have been informed that no error was allowed to creep into the record at the second trial. Again the jury rendered judgment in favor of Oglesby for $15,000, and again the case was appealed to the Supreme Court. An election was coming on, and the railroad needed yet another man to beat the Oglesby case. The Democratic nominating convention was kind and furnished him, in the person of Fox. The railroad, backed by four judges on the bench, allowed the case to come up for final hearing, and Monday the decision was handed down, reversed and not remanded for retrial. The victory of the railroad has been complete, and the corruption of the Supreme Court has been thorough. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. What hope have the ordinary citizens of Missouri for justice and equitable laws in bodies where such open venality is practiced? And how long will they stand it? The corporations have long owned the Legislature, now they own the

Supreme Court, and the citizen who applies to either for justice against the corporation gets nothing. Rube Oglesby and his attorney, Mr. O. L. Houts, have made a strong fight for justice. They have not got it. The quivering limb that Rube left beneath the rotten freight car on Independence Hill, and his blood that stained the right of way of the soulless corporation, have been buried beneath the wise legal verbiage of a venal court, and the wheels of the Juggernaut will continue to grind out men's lives, and a crooked court will continue to refuse them and their relatives damages, until the time comes when Missourians, irrespective of politics, rise up in their might and slay at the ballot box the corporation-bought law-makers of the State."

Upon the filing of said information, the court caused to be issued against the defendant the following citation: "Whereas, it is represented to our Supreme Court in banc, by the information of Edward C. Crow, Attorney-General of the State of Missouri, ex officio, a copy of which information is hereto attached, that you, the said J. M. Shepherd, publisher of a certain weekly newspaper at the city of Warrensburg, Missouri, called the *Standard-Herald*, did on the 19th day of June, 1903, while the case of H. R. Oglesby, respondent, against the Missouri Pacific Railway Company, appellant, was and still is pending in this court, publish a certain editorial and article then and there charging the

Supreme Court of the State of Missouri, and the members thereof, with bribery and corruption, in connection with the action of the court in the disposition of said case, and that you, the said J. N. Shepherd, by said editorial and article aforesaid, published in the said *Standard-Herald*, did defame, degrade, and insult the Supreme Court of the State of Missouri, and the members thereof, and did charge the said court and its members with corruption and partiality in the discharge of their official duties, and in the judicial official determination and disposition of said case of Oglesby vs. The Missouri Pacific Railway Company [76 S. W. —], and that said action in publishing said editorial and article brings the Supreme Court, and the members thereof, and the highest department of the judicial branch of the State government, charged with the final disposition and enforcement of law and justice, into disrepute, contumely, and contempt, and tends to destroy the power and influence of the court as an independent, coordinate branch of the State government, in the enforcement of the law and the administration of justice, and tends to and does causelessly inflame and incite the prejudices of the people against the said Supreme Court, and tends to and does affect the said court so as to directly obstruct and interfere with and impede the administration of justice in the above-mentioned cause, and which said cause is now and here pending in said Supreme Court: Now, therefore, you, the said

J. M. Shepherd, are hereby commanded to be and appear before the Honorable Supreme Court of Missouri, in banc, on Wednesday, July 22, 1903, at nine o'clock in the forenoon, at the Supreme Courthouse in the City of Jefferson, in the county of Cole, in the State of Missouri, then and there to show cause, if any you have, why an attachment should not issue against you for the contempt of this court, in publishing said editorial and article aforesaid, and hereof fail not."

On the return day of the rule the defendant filed the following return: "In obedince to the command of this court heretofore made upon him, comes J. M. Shepherd, and for his return to the order to show cause heretofore issue herein, respectfully shows: (1) That this court has no jurisdiction to hear and determine the charge as contained in said complaint. (2) That said complaint and information does not state facts sufficient to authorize the issuance of an attachment for contempt of this court. (3) That it is true that on the 19th day of June, 1903, and long prior thereto, he was, and is still, the publisher and proprietor of a weekly newspaper published in the city of Warrensburg, State of Missouri, called the *Standard-Herald*, and that at said date he caused to be published in said newspaper the article set out in full in said complaint. (4) That he denies the other allegations set out in said complaint and information, and demands strict proof thereof. (5) Said article was not issued or circulated in

the presence or hearing of the court, and was not intended to interfere, nor did it interfere, with any of the business of said court, or any of its officers. (6) That nothing in said article referred to in said information tends to, or does it, affect the said court so as to obstruct or interfere with or impede the administration of justice by said court. (7) That at the time said article was published respondent believed the cause therein referred to had been finally disposed of by this court, and, if said cause was still pending in this court, he had no knowledge of that fact. (8) Said complaint and information, and the notice issued therein, and all proceedings thereunder, were and are in violation of section 14, art. 2, of the Constitution of Missouri, which provisions are specially invoked herein. (9) That said information, and the proceedings thereunder, as proposed, deny to said Shepherd the right of a trial by jury of questions of which this court has no personal knowledge, all in violation of section 28, art. 2, of the Constitution of Missouri, which is specially invoked herein. (10) That said complaint, and the proceedings thereunder, as proposed, are in violation of section 30, art. 2, of the Constitution of Missouri, which is specially invoked herein. (11) That said complaint and information, and the proceedings had and proposed thereunder, are all in violation of section 1 of the fourteenth amendment to the Constitution of the United States, which is specially invoked herein, together with all the rights and privileges guar-

antied thereunder. (12) That section 1616 of the Revised Statutes for 1899 provides: 'Sec. 1616. May Punish Contempt. Every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of the following acts, and no other: First, disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, willful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory.' And this respondent states that, by virtue of said statute, this court is not authorized to punish this respondent on account of any of the matters charged in the information herein. Wherefore he asks that this complaint be dismissed.

The matter coming on for hearing, the defendant appeared in person and by counsel.

The Attorney-General, in open court, demanded of the defendant and his counsel to know whether or not they desired an opportunity to introduce evidence to show the truth of the matters charged in the articles aforesaid, and announced the readiness of the State to

proceed at once with the trial thereof. One of defendant's counsel, Mr. New, stated that as the return denied all the allegations of the information not specially admitted, and demanded strict proof of the allegations of the information, his position was that the burden of proof was upon the informant to prove the falsity of the charges, and not upon the defendant to prove the truth of the charges. The other counsel for the defendant, Mr. Bradley, stated that, so far as he was concerned, he did not believe the charges were true, and that he did not desire an opportunity to introduce any evidence to show that they were true. Thereupon the hearing was proceeded with; the defendant standing upon the defenses set up in his return, with the additional point that the information was not verified. Upon final submission, the court adjudged the defendant guilty of contempt of court, and fixed his punishment at a fine of $500 and costs, the defendant to stand committed until the same was paid. Thereupon the fine and costs were paid. Ordinarily this would close the case and the incident. But as this is the first case of this character that has ever arisen in this State or court, it was stated at the time of the rendition of the judgment that a written opinion would be prepared and promulgated later, in order that the reasons upon which the judgment rested, and the law applicable to such cases, might be known and understood to the end that well-disposed and good citizens might not innocently offend in such

regard, and that all others guilty of like violations of law should have notice of the consequences.

1. The Contempt Involved in This Case. — At the outset, it is proper to analyze the article in question, so as to clearly understand the character and scope of the charges. The article starts out with an attack upon the Attorney-General and the Governor of the State, in connection with offenses alleged to have been committed by members of the legislative branch of the government. Then it alleges that, "as a capsheaf of all this corruption in high places," this court, "at the whipcrack of the Missouri Pacific Railroad, sold its soul to the corporations." It then refers to the course, on former appeal, of the case of Oglesby against the Missouri Pacific Railroad in this court, and says: "Each election has seen the hoisting of a railroad attorney to the Supreme Bench." It then charges that the case was reversed and remanded for a new trial, and upon such new trial the plaintiff again obtained a verdict, and an appeal was again taken; that the railroad needed another man to beat the case, and that the Democratic nominating convention furnished him, and that "the railroad, backed by four judges on the bench, allowed the case to come up for final hearing;" and that the judgment was reversed, and the cause not remanded for retrial. The article then charges that "the victory of the railroad has been complete, and the corruption of the Supreme

Court has been thorough. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. What hope have the ordinary citizens of Missouri for justice and equitable laws in bodies where such open venality is practiced? And how long will they stand it? The corporations have long owned the Legislature, now they own the Supreme Court, and the citizen who applies to either for justice against the corporation gets nothing." Thus it will be observed that this scandalous article makes the following charges: First, it charges the Attorney-General and the Governor with faithlessness in the discharge of their duties; second, it charges the legislative department with high and grave misdemeanors; third, it charges the Supreme Court with having "sold its soul to the corporations," of being composed of railroad attorneys, of being guilty of corruption, of practicing open venality, of having been "bought in the interest of the railroad," and, like the Legislature, of being "owned" by the railroads; fourth, it charges the Democratic nominating convention of 1902 with having been dominated by the railroads, and with having nominated a candidate for Supreme Judge who would favor the railroad in the Oglesby case. In short, the article attacks the honesty, integrity, and purity of every branch of the State government, and

of the several officers, and then attacks the Democratic nominating convention of 1902. If these charges are true, the persons who are thus charged should be prosecuted and removed from office. On the other hand, any one who makes such charges should be prepared to make some sort of a decent showing of their truth. Instead of standing ready to prove the truth of the charges, the defendant, when called into court, neither asserts the truth of the charges, nor does he accept the challenge of the Attorney-General to introduce any evidence whatever of their truth. On the contrary, one of his counsel takes the very erroneous position that the burden of proof is upon the informant to show the falsity of the charges and not upon the defendant to prove the truth of the charges, while his other counsel expressly states that he does not believe the charges are true, and does not desire to introduce any evidence to show that they are true. In other words, the defendant has grossly, indecently, and cruelly vilified and scandalized every department of the government under which he lives, and which affords him protection for his life, liberty, and property, and, when challenged to make his words good, he consummates his offending by failing absolutely to produce one word of testimony to show that he told the truth, and, instead of making the "amende honorable," by withdrawing the charges and apologizing like a man, he seeks to escape punishment by

challenging the jurisdiction of this court to protect itself from insult and to maintain the respect and dignity with which the people have invested it, denies that the facts charged are sufficient to constitute a contempt, and raises other technical and constitutional questions. As above stated, this is the first case of this kind that has come before this court. It is not, however, the first time that highly improper articles have been published concerning this court and other courts in this State, but it is the first case wherein the character and heinousness of the charges has made it absolutely imperative upon this court to take cognizance of them. It is, by no means, however, the first case of its kind that has arisen. The books are full of cases, both English and American, where other courts have been similarly scandalized, and have punished the vilifiers as for a contempt of court.

2. Inherent Power of Courts of Record to Punish Contempts. — The first question raised by the defendant in this case is as to the power and jurisdiction of this court to punish him summarily for a criminal contempt. The power to punish for contempt is as old as the law itself, and has been exercised so often that it would take a volume to refer to the cases. From the earliest dawn of civilization, the power has been conceded to exist. It has been exercised, or not, as a matter of public policy, but its existence has never been denied. In England it has been exercised when the contempt consisted of scandalizing the

sovereign or his ministers, the lawmaking power or the courts. In the American colonies the same rule obtained, and was exercised quite frequently. Since the Revolution, and the adoption of the Constitution of the United States, and the establishment of this government of the people, by the people, and for the people, the English rule has been modified so far as the executive department and the ministers of state are concerned, and in some degree so far as the legislative department is concerned, but has been almost universally preserved so far as the judicial department is concerned. For instance, in England it was an offense, called "sedition" to speak or write against the character and constitution of the government, or to seek to change it by any means except those prescribed. There was also an offense known as "scandalum magnatum," which consisted of scandalizing the sovereign, his ministers, members of Parliament, the courts and the judges, and certain other persons of high rank. It is interesting to note the difference in policy with reference to the enforcement of the laws of other countries in respect to sedition and scandalum magnatum. The first case of which there is a report at hand "was that wherein Emperor Augustus desired to punish a historian who passed some stinging jest on him and his family, but Mæcenas advised him that the best policy was to let such things pass and be forgotten. Other sovereigns took the

same view. Cæsar said that to retaliate was only to contend with impudence and put oneself on the same level. And even Tiberius acted upon the same view. The Theodosian Code also made this the law, and expressly declared that slanderers of majesty should be unpunished, for, if this proceeded from levity, it was to be despised; if from madness, it was to be pitied; and, if from malice, it was to be forgiven; for all such sayings were to be regarded according to the weight they bore." Patterson on Liberty of Press, Speech, etc., p. 87. But while such was the policy of these Latin countries, exactly the converse has long been the established law among English-speaking people. As early as the reign of Edward I, it was an offense to publish false news or tales, whereby discord might grow between the King and his people. 3 Edw. I, c. 34. Construing this act Lord Ellenborough, C. J., said: "If a person who admits the wisdom and virtues of his majesty laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, he was not prepared to say that this tends to degrade his majesty or to alienate the affections of his subjects. He was not prepared to say this is libelous, but it must be with perfect decency and respect, and without any imputation of bad motives. If the writer were to go one step further, and say or insinuate that his majesty acts from any partial or corrupt view, or with an intention to

favor or oppress any individual or class of men, then it must have been most libelous." In England it is an offense to libel ministers of state. Holt, C. J., in Tutchin's Case, 14 St. Tr. 1128, said that "to assert that corrupt officers are appointed to administer affairs is a reflection on the government, and tends to beget an ill opinion of the administration of the government. Criticisms which make no fair allowances to these public servants as being honestly desirous to do their work well, and imputing corruption or dishonesty, or any other personal vice incompatible with a high sense of duty, are thus treated as libels." In 1804 one Cobbett published a letter in which he spoke of Lord Hardwicke, Lord Lieutenant of Ireland, and Lord Redesdale, Lord Chancellor of Ireland, as "a very eminent sheep-feeder from Cambridgeshire, assisted by a very able and strong-built chancery pleader from Lincoln's Inn." He was prosecuted for libel, and Lord Ellenborough told the jury that "if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime." Rex v. Cobbett, 29 St. Tr. 54. In 1786 the *Morning Herald* charged Pitt, the Prime Minister, with gambling in the funds, and fraudulently availing himself of official information to make money on the stock exchange. He sued the publisher for

libel, and Lord Mansfield told the jury to remember this was "a very serious question, in which all the public were concerned, namely, whether there should be any protection to the reputation of honorable men in public or private life." The jury returned a verdict for £250. Patterson on Liberty of the Press, etc., p. 95.

The offense of scandalum magnatum has not existed in this country since the Revolution, but every one, of whatever rank or station in life, stands upon the same footing before the law, and is entitled to the same protection for his life, his liberty, his property, and his reputation. In the eye of our constitutions and laws, every man is a sovereign, a ruler, and a freeman, and has equal rights with every other man. We have no rank or station, except that of respectability and intelligence, as opposed to indecency and ignorance; and the door to this rank stands open to every man to freely enter and abide therein, if he is qualified, and whether he is qualified or not depends upon the life and character and attainments and conduct of each person for himself. Every man may lawfully do what he will, so long as it is not mala in se or mala prohibita, or does not infringe upon the equally sacred rights of others. Every man may speak or write what he will, so long as he tells the truth, but no man has any more right to-day to bear false witness against his neighbor than he had in the days of Moses.

During the administration of the elder Ad-

ams a sedition law was enacted, making it an offense to libel the government, the Congress, or the President of the United States, and four cases were prosecuted under it. But its constitutionality was always disputed by a large part of the citizens, and its impolicy was beyond question. It brought about the very conditions it was intended to repress, and was soon repealed. Cooley's Const. Lim. (6th Ed.), p. 526; Odgers on Libel & Slander, p. 416. The only offense of this general character which is known to our law is attempt, "by word, deed, or writing, to promote public disorder, or to induce riot, rebellion, or civil war, which acts are still considered seditions, and may, by overt acts, be treason." Odgers on Libel and Slander, p. 419. The Parliament of England has, at least since as early as the reign of Richard II, claimed an inherent right to punish summarily, as for a contempt, any breach of its privileges, and the books are full of cases wherein it exercised the power, as many as 30 cases occurring during the seventeenth century. The Parliament has always claimed and exercised the right to be the sole judge, without any interference or review by the courts or otherwise, whether a contempt against its privileges has been committed, and how it shall be punished, and this power has been conceded to it. Paterson on Liberty of Press, etc., p. 105 et seq.; Odgers on Libel and Slander, p. 422. So jealous and tenacious is Parliament of its rights in this regard, that in 1689 it

actually cited two judges before it for contempt, for entering a judgment against the sergeant of the House, based upon his act in executing the orders of the House. And although the judges insisted that their act was only an error of judgment, they were adjudged guilty of contempt of the privileges of Parliament, and were committed to prison in Newgate, where they remained eight months. Paterson's Liberty of the Press, etc., p. 201. The Congress of the United States and the Legislatures of the several States have also an inherent power to punish for certain contempts, but this power is not generally admitted to be as broad as that of the Parliament of England. The courts of England have uniformly, from the beginning, exercised the right to punish for contempt, and the courts of America have always exercised a like power. Blackstone, vol. 4, p. 285, in treating of such contempts, and the power of the court to punish therefor, says: "Some of these contempts may arise in the face of the court, as by rude and contumelious behavior; by obstinacy, perverseness, or prevarication; by breach of the peace, or any willful disturbance whatever; others, in the absence of the party, as by disobeying or treating with disrespect the King's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; *by speaking or writing contemptuously of the court or judges, acting in their judicial*

capacity" (the italics are superadded for the sake of emphasis); "by printing false accounts, or even true ones without proper permission, of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people."

Speaking to this subject, Paterson on Liberty of the Press, etc., p. 121, aptly says: "Courts of law must, therefore, as in the case of Parliament, be credited with sufficient power to vindicate and protect their procedure against attacks, for, as courts are the appointed means of adjudicating on all disputes, and for discovering all sufficient materials to that end, their labors would be often futile, if irresponsible volunteers intruded crude opinions and speculations, founded, as they must usually be, on defective data. The first requisite of a court of justice is that its machinery be left undisturbed, and this cannot be effected unless comments be all but excluded till the court has discharged its function. The same power to commit summarily for contempt all persons who intrude into the judicial function, and profess to have better and superior means of knowledge, or who suggest partial or corrupt conduct, is thus deemed inherent in all courts of record, though the occasion and extent of this summary jurisdiction have given rise to nice dis-

tinctions. It is said to be a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of it. This exercise of power is as ancient as any other part of the common law. If the course of justice is obstructed, that obstruction must be violently removed. When men's allegiance to the laws is fundamentally shaken, this is a dangerous obstruction. That the judges should be credited with impartiality is absolutely necessary. Therefore to libel or slander the administration of the law by imputing misconduct to the judge or jury is an indictable offense. Judges are also protected in other ways. To kill a judge in the performance of his duties is no less than high treason. Coke says that to draw a weapon at a judge sitting in court was a great misprision, for which the right hand was cut off and the goods were forfeited. To utter threats or reproaches to a judge sitting in court is always an indictable misdemeanor." Rapalje on Contempts starts his work, in section 1, with these statements: "It is conclusively settled by a long line of decisions that at common law all courts of record have an inherent power to punish contempts committed in facie curiæ; such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court. * * * Each superior court being the judge of its own power to punish contemners, no other

court can question the existence of that power, and the facts constituting the contempt need not be set out in the record. This inherent and necessary power can be exercised by a superior court independently of statutory authority, and such court may go beyond the powers given by statute, in order to preserve and enforce its constitutional powers, when acts in contempt invade them. Indeed, the conferment of the power by statute upon a superior court of record is deemed no more than declaratory of the common law." In the note to the text the author has collated decisions establishing this to be the law in Alabama, Arkansas, California, Connecticut, Florida, Indiana, Illinois, Kansas, Kentucky, Massachusetts, Maine, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, West Virginia, and in the United States courts, as well as in England. In 7 Am. & Eng. Enc. of Law, p. 30, the rule of law is thus stated: "The right of every superior court of record to punish for contempt of its authority or process is inherent from the very nature of its organization, and essential to its existence and protection and to the due administration of justice." And in the note to the text the writer sets out a multitude of cases from the States and jurisdictions referred to by Rapalje, and shows that such is also the law in Colorado, Georgia, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, Vermont,

and Virginia. Judge Cooley, in his work on Constitutional Limitations (6th Ed.), p. 389, note 2, says: "Cases of contempt were never triable by jury, and the object of the power would be defeated in many cases if they were. The power to punish contempts summarily is incident to courts of record." In support of the law as thus stated the learned author cites cases from England, the United States courts, Maine, New York, Tennessee, Illinois, Arkansas, Kentucky, North Carolina, Mississippi, New Hampshire, Connecticut, Indiana, and Rhode Island. Best, J., in Rex v. Davison, 4 Barn & Ald. loc. cit. 340, decided in 1821, said: "From the earliest period of our history, this authority has been exercised. The Year Books record instances of such commitments." All the judges in Miller v. Knox, 4 Bing. N. C. 574, said it is "an acknowledged principle that the power of summarily punishing for contempt has been inherent in all courts of record from time immemorial." In fact, so well settled is the law in England in this regard that it is said in 3 Enc. of the Laws of England, p. 313: "A court of justice, without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are intrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. * * * Without such protection, courts of justice would soon lose their hold upon public respect, and the maintenance of

law and order would be rendered impossible." Blackstone declares that "laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." 4 Black. Com. 286. And the law is as firmly settled in America as it is in England. In Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, the Supreme Court of the United States, speaking through Mr. Justice Field, said: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." In Cartwright's Case, 114 Mass. 238, Gray, C. J., afterwards Associate Justice of the Supreme Court of the United States, said: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other supe-

rior courts, as essential to the execution and to the maintenance, of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." In Watson v. Williams, 36 Miss. 341, Harris, J., said: "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them, by the wise provisions of the common law. A court without the power to effectually protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against recusant persons before it, would be a disgrace to the legislation, and a stigma upon the age that invented it." In State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257, Snyder, J., said: "It may be stated as a proposition of law unquestioned and unquestionable that by the common law of England, as well as by the uniform decisions of the courts of this country, courts have the inherent power to punish contempts in a summary manner, and that this power is an essential element and part of the court itself, which cannot be taken away without impairing the usefulness of the court, because it is a power necessary to the exercise of all others." To the like effect are the decisions in the other States of the Union above referred to.

If each court did not possess the power to punish contempts committed against itself, the jury, and, its officers, summarily, it would be easy for a contemner to escape punishment entirely. For if the matter was sent to another court, or left to be tried by a jury, the contemner could so insult and abuse such other court or the jury as to render it impossible for them, also, to try him, also, and, by thus renewing his offense to every court he was called before, make it impossible to punish him at all. It is manifest that if the jury is insulted and treated with contempt, the court must protect them, for they can render no judgment and are powerless to protect themselves. It would be paradoxical to say the court alone can punish a contempt of the jury, but had no power to protect itself from contempt. Without further exemplification, therefore, the law must be regarded as settled that this court has the inherent power and jurisdiction to punish contempts summarily.

3. What Contempts may be Punished Summarily.— The next proposition in this case is, what character of contempts this court has the inherent power to punish summarily. Contempts are classified as civil or criminal, and as direct or constructive. Civil contempts are defined to be such as a private person is affected by, as, for instance, where a party refuses to obey a judgment or order of court which will benefit such private person. In such instance the case is not punitive, but ex-

ecutive, and the punishment is to commit the offender until he complies with the order. Criminal contempts are all acts committed against the majesty of the law, or against the court as an agency of government, and in which, therefore, the state and the whole people are concerned. In such instance the proceeding is punitive, and the punishment operates in terrorum, and by that means has a tendency to prevent the repetition of the offense. Rapalje on Contempts, § 21, adopting the definition of Beatty, J., in Phillips v. Welch, 11 Nev. 187. See also 7 Am. & Eng. Enc. Law (2d Ed.), p. 28. Direct contempts are generally those which are committed in the presence of the court, while in session, or so near as to interrupt its proceedings, but also include any improper conduct tending to defeat or impair the administration of justice, while constructive contempts arise from matters not transpiring in court, and which tend to degrade or make impotent the authority of the court, or in some manner to impede or embarrass the administration of justice. The power to punish is the same in both cases. The difference is only one of procedure. In cases of direct contempts the court acts spontaneously, ex mero motu, and commits the offender summarily. In cases of constructive contempts the court, upon information furnished by any citizen, and verified by affidavit, or exhibited by the Attorney-General ex officio, which is supported by his official oath, and therefore needs no other verification, or upon

its own information or motion, issues a citation to the offender to show cause why he should not be punished for contempt. 4 Black. Com. 286–7; Odgens on Libel & Slander, pp. 133–4; Paterson on Liberty of Press, etc., p. 99. Lord Chancellor Hardwicke, in the case against the printer of the *St. James Evening Post*, 2 Atkyns' Rep. loc. cit. 471, defines contempt of court as follows: "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may likewise be a contempt of this court in abusing parties who are concerned in cases here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." It will be observed that the first kind of contempt spoken of, to wit, scandalizing the court itself, is a matter wherein the State, the people, and the court are vitally interested. It is therefore a public matter, and hence is a criminal contempt. The other two kinds of contempt spoken of are such as directly affect a party litigant, and at the same time affect the public generally only in so far as it is of importance "to keep the streams of justice clear and pure." Blackstone also makes the same distinction, and defines contempts, *inter alia*, to consist in "speaking or writing contemptuously of the court or judges, acting in their

official capacity." 2 Black. Com., p. 285. This distinction has been overlooked in some of the adjudicated cases, and hence the error they have fallen into of saying that the contempt must relate to a cause that is still pending, and, if the cause is disposed of, that will be no contempt which would have been a contempt if it had occurred while the cause was pending. The theory of such cases is that the act had a tendency to injuriously affect the rights of a party litigant in a pending litigation, or had a tendency to embarrass, although it might not actually influence, the court in the determination of a pending cause. It must be obvious to the discriminating mind that such cases fall properly under the second or third classes pointed out by Lord Hardwicke, *supra*, but that they do not cover the whole field, for there is still the first kind of a contempt, to wit, scandalizing the court itself, in which the public is primarily interested, and as to which the injury is just as great whether it referred to a particular pending case, or only to the court as an instrumentality of government. This is illustrated by the adjudicated cases. In the case of In re Charlton, 2 Mylne & Craig, 316, decided in 1836, in Macgill's Case, 2 Fowl. ex pr. 404, and in Re Wallace, L. R. 1 P. C. 283, *s. c.* 1 Privy App. 283, it was held to be a direct contempt of court to send libelous, scandalous, or threatening letters to a court or a judge. Charlton's Case, *supra*, is one of the most celebrated of its kind. Lord Cottenham, Lord Chancellor,

said: "It is a contempt of the highest order; and, although such a foolish attempt as this cannot be supposed to have any effect, it is obvious that, if such cases were not punished, the most serious consequences might follow. If I consulted my own personal feelings upon the subject, I should pass by these letters as a foolish attempt at undue influence; but, if I were to adopt that course, I should consider myself guilty of a very great dereliction of my high duty." Charlton's Case, 2 Mylne & Craig. loc. cit. 342.

The limits of this opinion preclude any extensive review of the cases wherein attorneys, citizens, and newspaper editors have been punished summarily, as for a criminal contempt, for scandalizing the court or a judge. The following are only a few of such cases: Wraynham was convicted of saying of Lord Bacon that he had done unjustly and was worse than a murderer. 2 St. Tr. 1071. For saying to Judge Hutton, "I accuse you of high treason," Harrison was fined £5,000 and sent to prison, and in addition the judge recovered £10,000 damages. Rex v. Harrison, 3 St. Tr. 1375. Lord George Gordon was convicted and punished for publishing a libel on the judges, in which he said: "How long shall these whited walls of counsel command us to be hanged contrary to law? They make long charges to the juries, with a show of justice and religion. They shed our innocent blood for expiable trespasses." In Reg. v. Skipworth and De Castro, 12 Cox, Crim. Cases,

371, decided in 1873, De Castro had been the claimant of the Tichbourne estates, had been nonsuited, and was committed for trial upon a charge of perjury. He and Skipworth held meetings in various parts of the country to excite sympathy for his cause and to collect funds for his defense. At a meeting in Brighton, Skipworth presided, and in his speech he impugned the honesty and impartiality of Lord Chief Justice Cockburn, the judge who was to preside at the trial of his friend, De Castro, for perjury. Some one hissed, and he replied, "Yes, sir; you may hiss, but I hiss at the Lord Chief Justice." De Castro also spoke and charged the Lord Chief Justice with having denounced him as a rank impostor, and therefore of being too prejudiced to try his case. They were cited for contempt, and each fined £500 and sent to prison for three months. In Rex v. Almon, Wilmot's Notes of Opinions & Judgts., p. 233, *s. c.* 8 St. Tr. 53, it was held to be a contempt of court, and a libel, punishable by attachment, to publish a pamphlet asserting that judges have no power to issue an attachment for libels upon themselves, and denying that reflections upon individual judges are contempts of court at all. In Ex parte Turner, 3 Mont., D. & De G. 523, a solicitor for the defeated party, after the case was over, published a pamphlet in which he pronounced the judgment "an elaborate production, wholly beside the merits of the case," and employed other flippant and contumacious observations. He was held

guilty of contempt. Other cases which hold the same doctrine will be referred to hereinafter, in connection with the right of trial by jury in contempt cases, and the liberty of the press, because they also bear upon those questions.

These considerations result in holding that this court has jurisdiction to punish summarily civil as well as criminal contempts, and that this power is the same whether the contempt be direct or constructive, there being only a difference of procedure in the two cases. The contempt in this case is both criminal and civil. It is criminal, because it scandalizes the court itself, and therefore it is a matter of public concern; and it is civil, because it abuses parties to a cause that is still pending in this court, and because it seeks to prejudice mankind against parties to such pending litigation. It is also a libel upon a majority of the individuals composing this court, for which such individuals have a private right of action. Such judges, as individuals, may choose to treat the article with contempt as Lord Chancellor Cottenham did in Charlton's Case, 2 Mylne & Craig, 342, and as the judges of the Colorado court did in Cooper v. People, 22 Pac. loc. cit. 800. But because, as the Supreme Court of Colorado said in the Cooper Case, *supra*, "they are the people's courts, and contemptuous conduct towards the judges in the discharge of their official duties, tending to defeat the due administration of justice,

is more than an offense against the person of the judges — it is an offense against the people's court, the dignity of which the judge should protect, however willing he may be to forego the private injury"— and because, as Lord Chancellor Cottenham said in Charlton's Case, *supra*, "it is obvious that, if such cases were not punished, the most serious consequences might follow," and because, if the contemner was allowed to escape punishment, the people would have just cause to complain of the judges of this court for not enforcing proper respect for this instrument established by the people for the administration of justice, this court felt constrained to take notice of the contempt in this case.

The ill-disguised effort of the contemner to make a political issue of the matter is not a proper subject for the court to deal with. The law-abiding, intelligent and patriotic people of this State will effectually settle that matter, if they are ever given an opportunity to deal with it.

4. Power of the Legislature to Abridge the Inherent Power of the Court to Punish Contempt. — The defendant further invokes section 1616, Rev. St. 1899, and claims that under this section this court has no power to punish this contempt, because it does not fall under any of the offenses which courts are authorized by that section to punish as contempts. The section relied on is as follows: "Sec. 1616. May Punish Contempt. Every court of record shall have power to

punish, as for a criminal contempt, persons guilty of the following acts, and no other: First, disorderly, contemptuous or insolent behavior, committed during the sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, willful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal or proper interrogatory." If the Legislature had power to abridge or impair the power of this court to punish for contempts, then the defendant in this case could not be held liable. But if the Legislature had no such power, then the section of the statutes quoted is unconstitutional and not binding upon the court. It has already been pointed out, in paragraph 2 of this opinion, that the power of this court to punish contempts is inherent, and that statutes which attempt to confer such power have always been treated as conferring no new power, but as simply declaratory of the common-law power that already belonged to every court of record. The law is well settled, both in England and America, that the Legislature has no power to take away,

abridge, impair, limit, or regulate the power of courts of record to punish for contempts. Rapalje on Contempts, § 11; 7 Am. & Eng. Enc. of Law (2d Ed.), p. 33; Arnold v. Commonwealth, 80 Ky. 300, 44 Am. Rep. 480; Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650; State v. Morrill, 16 Ark. 384; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; Worland v. State, 82 Ind. 49; Cheadle v. State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; Holman v. State, 105 Ind. 513, 5 N. E. 556; Matter of Shortridge, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78; People v. Stapleton, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; In re Chadwick (Mich.), 67 N. W. 1071; Hawes v. State, 46 Neb. 150, 64 N. W. 699; Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691. In Wyatt v. People, 17 Colo. 261, 28 Pac. 964, the court said: "Though the Legislature cannot take away from the courts created by the Constitution the power to punish contempts, reasonable regulations by that body touching the exercise of this power will be regarded." But this, it must be observed, leaves it to the courts to decide whether or not the regulations that may be prescribed are reasonable, and also proceeds upon lines of comity between the courts and the Legislature, and not upon any recognition of the absolute right of the Legislature to enact such regulations. In addition to

this, it is now well-settled law in this State, as well as in other States, that the courts have nothing to do with the policy or reasonableness of a law, those being legislative and not judicial questions. So that, if it be conceded that the Legislature had any power to regulate the exercise of the inherent power of the court to punish contempts, the court could not refuse to obey the law because it deemed the regulations unreasonable. However, it is a contradiction of terms to say the power to punish is inherent, but that the Legislature may regulate the exercise. As the Supreme Court of the United States said in Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, the power to regulate includes the power to say in what cases the right shall be exercised. It is worthy of observation that in only the States of Georgia and Louisiana is power given by the Constitution of the State to the Legislature to limit the power of the court to punish for contempt. In all the other States the better opinion is that, where the court is a creature of the constitution, the inherent power to punish contempt cannot be shorn, abridged, limited, or regulated. This is the only logical view to take, because by Const. art. 3, the powers of government are distributed between the legislative, executive, and judicial departments, and it is further expressly provided that "no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power

properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted." And nowhere in the Constitution is the Legislature given any power to meddle with the inherent powers of the courts. It was upon the faith of this provision of the Constitution that this court refused to interfere with the prerogatives of the Governor in the discharge of his duties in the case of State ex rel. Robb v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705, and likewise refused to interfere with the inherent powers of the Legislature in State ex rel. v. Bolte, 151 Mo. 362, 52 S. W. 262, 74 Am. St. Rep. 537. In its dealings with the powers and acts of the co-ordinate branches of government, this court has scrupulously refrained from interfering, and has accorded to such co-ordinate branches the fullest measure of respect; and upon the same principle this court will not tolerate any interference by a co-ordinate branch of the government, or by any one else, with the powers and duties and prerogatives and dignity of this court. The people of this State conferred those powers, in trust for themselves, upon this court; and this court will sacredly and fearlessly guard and protect them until the people discharge the trust and give the powers to some other tribunal, if they should ever be minded so to do. It is also well-settled law that the court alone in which a contempt is committed, or whose authority is defied, has power

to punish it, or to entertain proceedings to that end. No other court has any jurisdiction or power in such cases. Rapalje on Contempt, § 13; 7 Am. & Eng. Enc. Law (2d Ed.), p. 34, and cases cited in note 1, and from which it appears that this is the rule laid down by the United States courts, and by the courts of Alabama, California, Colorado, Florida, Illinois, Iowa, Kentucky, Louisiana, Mississippi, Nevada, New Hampshire, Tennessee, Texas, Utah, and Vermont. Paterson on Liberty of the Press, etc., p. 121, says this power must be accorded to all courts, just as itis possessed by Parliament. The law now known as section 1616, Rev. St. 1899, has been on the statute books, in substantially the same form, ever since 1845. Rev. St. 1845, p. 338, c. 45, § 61. It was referred to by this court in Harrison v. State, 10 Mo. 688, but its constitutionality was not called in question, or discussed or decided. The same law, then known as section 65, c. 47, p. 542, 1 Rev. St. 1855, was referred to by this court in the matter of Greene Co. v. Rose, 38 Mo. 390, where it was said: "When the contempt is committed in the immediate view and presence of the court, it may be punished summarily. In all other cases the party charged must be notified of the accusation, and have a reasonable time to make his defense." But the power of the Legislature to enact the law was not raised or decided. The same law, then known as section 1056, Rev. St. 1879, was referred to

in Ex parte Crenshaw, 80 Mo., loc. cit. 450, and the court was unanimous in holding that it did not have the effect of taking away the power of courts to punish other kinds of contempts. The constitutionality of the law was not considered by the majority of the court, but Sherwood, J., concurred in the judgment, holding the statute "to be unconstitutional, as an invasion by the Legislature of the domain of the judiciary." It follows that the Legislature exceeded its powers when it enacted section 1616, Rev. St. 1899, and that this court has an inherent and constitutional right to punish contempts summarily, which cannot be taken away, abridged, limited, or regulated by the legislature. For the manner in which this power may be executed, this court is answerable alone to the sovereign people of this State; and to their judgment and wishes, legally expressed, it has always given cheerful and respectful obedience, and it stands ready to do so now and at all times.

5. Right of Trial by Jury in Contempt Cases.— The defendant invokes the protection of section 28, art. 2, of the Constitution, which provides that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," and demands a trial by jury in this case, and incidentally argues that it is not seemly or fair that he should be tried for contempt by judges of the court that he has scandalized. The judges of this court would have gladly sent this matter to some other court for

trial, and by a jury, too, if such a course had any precedent or justification in law. But as such a course would have been illegal and a shirking of their imperative obligations under the law, they had no option but to deny the request and to execute the law. Attention has already been called to the law as laid down by Judge Cooley in his work on Constitutional Limitations (6th Ed.), p. 389, note 2, wherein he says: "Cases of contempt of court were never triable by jury, and the object of the power would be defeated in many cases if they were." Cases from England, Pennsylvania, Maine, New York, Tennessee, Illinois, Arkansas, Kentucky, North Carolina, Mississippi, New Hampshire, Connecticut, and Rhode Island are cited by the learned author in support of the rule. Rapalje on Contempts, § 10, says: "It has been held that the provision in the Constitution of the United States that the trial of all crimes shall be by jury does not take away the right of court to punish contempts in a summary manner. The provision is to be construed to relate only to those crimes which, by our former laws and customs, had been tried by a jury." The author cites in support of the text the cases of Hollingsworth v. Duane, Wall. Sr. 77, Fed. Cas. No. 6,616, Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529, and State v. Doty, 32 N. J. Law, 403, 90 Am. Dec. 671. In the case last cited the Supreme Court of New Jersey held that the constitutional right of trial by jury was not infringed by the infliction of summary

punishment for contempt of court. In that case the contempt consisted of improper conduct towards a juror, not in the presence of the court. Rapalje on Contempts, § 112, says: "In nearly all of the States, as well as under the practice of the Federal courts, the common-law rule denying to one accused of contempt the right of trial by jury is still in force, the courts holding that the various constitutional guaranties of this right have no application to these proceedings." In 4 Enc. of Pl. & Pr., p. 789, the rule of law is thus aptly stated: "Although the question determinable in proceedings to redress contempts is one of fact, and not of law, yet, the offense itself being one against the court and the majesty of the law, neither at common law was there any right to a jury trial (Wells v. Caldwell, 1 A. K. Marsh. 441; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801), nor according to the current weight of modern authority, except so far as the rule has been modified by local statutes [the author evidently means "Constitutions," for the statutes could not confer a right of trial by jury which the Constitution did not permit], does any such right inure to the benefit of the contemner." The author cites in support of the text the following cases: Neel v. State, 9 Ark. 259, 50 Am. Dec. 209; Huntington v. McMahon, 48 Conn. 174; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; McDonnell v. Henderson, 74 Iowa, 619, 38 N. W. 512; State v. Durein, 46 Kan.

695, 27 Pac. 148; Hart v. Robinett, 5 Mo. 11; Gandy v. State, 13 Neb. 445, 14 N. W. 143; Ludden v. State, 31 Neb. 429, 48 N. W. 61; State v. Matthews, 37 N. H. 450; Bates' Case, 55 N. H. 325; Burke v. Territory (1894), 2 Okl. 499, 37 Pac. 829; Crow v. State, 24 Tex. 12; King v. Ohio R. R. Co., 7 Biss. 529, Fed. Cas. No. 7,800. The author further adds, at the same page: "And it is held that the fact that there is no right to a jury trial does not violate the constitutional provisions which guaranty the same;" citing in support thereof State v. Mitchell, 3 S. D. 223, 52 N. W. 1052; State v. Becht, 23 Minn. 411, and Mandercheid v. District Ct., 69 Iowa, 240, 28 N. W. 551. The case of Hart v. Robinett, 5 Mo. 11, cited, was a rule on a constable to show cause why he had not returned an execution within the time required by law. The trial court submitted the matter to the determination of a jury. This court held that this was error, saying: "The cause was matter to be shown to the court, and not matter to be found by a jury. The proceeding was in the nature of a proceeding for a contempt, and was matter to be inquired into and adjudicated by the court." In Reg. v. Skipworth & De Castro, 12 Cox's Crim. Cases, 371, already referred to, De Castro demanded a trial by jury. The following colloquy took place between him and Blackburn, J.: De Castro said: "I am not aware that I have committed any contempt, and if I have done so, it was not my intention; but I submit

that the charge ought to be tried by a jury. Before them I could prove what I have stated to be true." Blackburn intimated that in a proceeding for contempt the matter was to be tried by the court. De Castro: "Then you decide that you are to try it yourselves? Blackburn, J.: Such is the course. De Castro: But, you see, I am charged with contempt in complaining of the Lord Chief Justice, and you are his colleagues. It is not fair that you should try it without a jury. Blackburn, J.: To use any argument upon that point would be without avail. It has long been settled that an attempt to interfere with the course of justice is a contempt of court. It is too late to dispute that." Accordingly, a jury trial was denied him. In Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155, the defendant, as publisher of the *Independent Gazetteer*, published an address to the public concerning a proceeding, then pending in court, wherein he was a party, which tended to prejudice the public with reference to the merits of such pending litigation. He was cited for contempt. It was insisted that the Constitution of Pennsylvania guarantied him a trial by jury, and hence the court could not itself try the case. The Supreme Court of that State, however, speaking through McKean, C. J., said: "It is certain that the proceeding by attachment is as old as the law itself, and no act of the Legislature, or section of the Constitution, has interposed to alter or suspend it. Besides the sections

which have been already read from the Constitution, there is another section, which declares that 'trials by jury shall be as heretofore;' and surely it cannot be contended that the offense with which the defendant is now charged was heretofore tried by that tribunal. If a man commits an outrage in the face of the court, what is there to be tried? What further evidence can be necessary to convict him of the offense than the actual view of the judges? A man has been compelled to enter into security for his good behavior for giving the lie in the presence of the judges in Westminster Hall. On the present occasion is not the proof, from the inspection of the paper, as full and satisfactory as any that can be offered? And whether the publication amounts to a contempt or not is a point of law, which, after all, it is the province of the judges, and not of the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The injurious consequences might then be justly imputed to the court for refusing to exercise their legal power in preventing them. For these reasons we have no doubt of the competency of our jurisdiction, and we think that justice and propriety call upon us to proceed by attachment." Accordingly, the defendant was denied a trial by jury, and was fined $100 and sent to pris-

on for 30 days. This case will be again referred to in connection with the discussion of the liberty of the press. The right of trial by jury in contempt cases never existed at common law, and was wholly unknown to the laws of Missouri at the time of the adoption of the Constitutions of 1820, 1865, and 1875. The guaranty of the Constitution of 1875, therefore, that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate," was not intended to confer such a right in contempt cases, for such a right had never been "heretofore enjoyed," either in this State or in England. There is, therefore, no man in the demand of the defendant in this case for a trial by jury.

But, even if all this was not true, what is the attitude of the defendant in this case, and what issues of fact had he raised that a jury could pass on? The return made by the defendant raises absolutely no issue of fact whatever. It admits that the defendant is the publisher of the paper, and that he published the article. A verdict of a jury could not settle those facts any more conclusively than the defendant himself has done by his admission. The return does not dare to say that the charges made are true. Neither does it plead any facts in mitigation, What issue of fact is there, then, for a jury to pass upon? Positively none. The return raises only questions of law, and, if the case was one wherein a jury could be impaneled, the court would be compelled, under this state of the

pleadings, to direct a verdict, for, after the court had decided the questions of law, the case would be decided, and there would be no function for the jury to perform. These considerations are recorded here, not because there is a particle of doubt in the mind of the court that the defendant is not entitled to a trial by jury, but simply for the purpose of showing that, even if the defendant was entitled to such a trial, it would do him no good in this case, and the result would necessarily be the same. It must be remembered that this is a case of contempt, and not one of libel. In libel cases the jury, under the direction of the court, determines the law as well as the fact. Heller v. Pulitzer Pub. Co., 153 Mo. 205, 54 S. W. 457. In contempt cases the whole matter is for the determination of the court. 6 Am. & Eng. Enc. Law (2 Ed.), 978, and cases cited in note 1.

6. Due Process of Law.— The defendant also invokes the protection of section 30 of article 2 of the Constitution, which provides "that no person shall be deprived of life, liberty or property without due process of law." The defendant has been accorded the full benefit of this wise provision of the organic law. He has been regularly charged, brought into court, has appeared in person and by counsel, has pleaded, and has had a trial according to the practice in such cases. He has had his day in court, and therefore he has had the benefit of due process of law. Cooley's Const. Law (6th Ed.), p. 431. This

also disposes of the claim that the defendant has been deprived in some way of the benefit of the fourteenth amendment to the Constitution of the United States. Dartmouth College v. Woodward, 4 Wheat. 519, 4 L. Ed. 629; Andrus v. Insurance Co., 168 Mo. loc. cit. 162, 67 S. W. 582

7. Liberty of the Press.— The defendant invokes section 14 of article 2 of the Constitution, which is as follows: "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." It will be observed that the liberty of the press is not mentioned at all. The freedom of speech is guarantied to "every person." Of course, the press will be included in the general designation of "every person." But the press has no greater liberty in this regard than any citizen. Newspapers and citizens have the same right to tell the truth about anybody or any institution. Neither has any right to scandalize any one or any institution. Barnes v. Campbell, 59 N. H. 128, 47 Am. Rep. 183; Pratt v. Pioneer Press Co., 30 Minn. 41, 14 N. W. 62; Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904; Bronson v. Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; McAllister v. Detroit Free

Press, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715. The first amendment to the Constitution of the United States specifically mentions the liberty of the press. It is as follows: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." It will be noted, however, that, though the press is here specially referred to, it is coupled with the freedom of speech of the citizens, and no special freedom is conferred upon the one that is not likewise conferred upon the other. It is most important, therefore, to clearly understand what is meant by "freedom of speech," or, as it is usually termed when speaking of newspapers, the "liberty of the press."

In 18 Am. & Eng. Enc. Law (2d Ed.), p. 1125, "liberty of the press" is thus defined: "The liberty of the press consists in the right to publish with impunity the truth, with good motives, and for justifiable ends, whether it respects governments or individuals; the right freely to publish whatever the citizen may please, and to be protected against any responsibility for so doing, except in so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the stand-

ing, reputation, or pecuniary interests of individuals."

Judge Cooley, in his invaluable work on Constitutional Limitations (6th Ed.), p. 518, says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

Paterson on the Liberty of the Press, etc., p. 5, clearly explains the right as follows: "The restraints which confine the natural liberty of speech will be found ranged under four great heads of blasphemy, immorality, sedition, and defamation. There are bounds to be set to the expression of thoughts and opinions, and these must rest on the fundamental prin-

ciples on which all societies are founded. It is assumed that there is a God in whom all citizens in their gravest moods are so interested that it becomes offensive to all the rest if any one speaks of Him publicly in a scurrilous and contemptuous tone, such as would provoke a breach of the peace. Hence the first limit to free speech is blasphemy. There are also rules of morality, which are so universal, and so underlie the conscience of every individual, that speeches and writings which treat these rules with public contempt, and sap and mine the simple faith in all that is good, noble, and worthy, are also deemed a species of constructive breach of the peace too irritating to be allowed. Hence another limit to free speech and writing is immorality. Again, there are rules of good conduct, founded on the general duty of all citizens to support the government under which they live, and, if possible, to insure due respect and fair treatment to its leading administrators. Hence gross contempt of all laws, and violent menaces of revolt against such guardians, must not be allowed, for these necessarily discompose every citizen, and perplex him with fear of change or fear of public disaster and anarchy. And when this last head is still further examined, it will appear that the great factors of government, consisting of the Sovereign, the Parliament, the ministers of State, the courts of justice, must all be recognized as holding functions founded on sound principles, and to be defended and treated with

an established and well-nigh unalterable respect. Each of these great institutions has peculiar virtues and peculiar weaknesses, but whether at any one time the virtue or the weakness predominates, there must be a certain standard of decorum reserved for all. Each guarded remonstrance, each fiery invective, each burst of indignation must rest on some basis of respect and deference towards the depository, for the time being, of every great constitutional function. Hence another limit of free speech and writing is sedition. And yet within that limit there is ample room and verge enough for the freest use of the tongue and pen in passing strictures on the judgment and conduct of every constituted authority. While the restrictions already mentioned, which are founded on blasphemy, immorality, and sedition, show the boundaries of free speech and thought as affecting the public generally, there is a fourth limit on the other side as affecting individuals, known under the head of 'Libel,' or the invasion of the reputation of private persons. This last limit involves the necessity of at once tracing the origin of that tendency of the individual to acquire such reputation and the value it possesses in his eyes, for it is here that the exercise of one natural right clashes directly with the exercise of the other, and both are equally natural and equally inevitable."

No better or clearer exposition of this subject has ever been written than what is said

by McKean, C. J., of the Supreme Court of Pennsylvania, in Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155. He said: "Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration of justice. * * * And here I must be allowed to observe that libeling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true that I may never discover the wretch who has burned my house or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeler admit not of this consolation. The injuries which are done to the character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity and all the happiness of his life. To what tribunal can he then resort? How shall he be tried, and by whom shall he be acquitted? It is in vain to object that those who know him will disregard the slander, since the wide circulation of the public prints must render it impracticable to apply the antidote as far as the poison has been extended. Nor can it be fairly said that the same opportunity is given to vindicate which has been employed to defame him, for many will read the charge who

will never see the answer; and, while the object of accusation is publicly pointed at, the malicious and malignant author rests in the dishonorable security of an anonymous signature. Where much has been said something will be believed; and it is one of the many artifices of the libeler to give to his charges an aspect of general support by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be No! What, then, is the meaning of the Bill of Rights and the Constitution of Pennsylvania when they declare 'that the freedom of the press shall not be restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any part of the government?' However ingenuity may construe the expressions, there can be little doubt of the just sense of these sections. They give to every citizen a right of investigating the conduct of those who are intrusted with the public business, and they effectually preclude any attempt to fetter the press by a licensor. The same principles were settled in England so far back as the reign of William III, and since that time we all know there has been the freest animadversion upon the conduct of the ministers of that nation. But is there

anything in the language of the Constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the Constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or will it be said that the constitutional right to examine the proceedings of government extends to warrant an anticipation of the acts of the Legislature or the judgment of the court; and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matter still in suspense? The futility of any attempt to establish a construction of this sort must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity. If, then, the liberty of the press is regulated by any

just principle, there can be little doubt that he who attempts to raise a prejudice against his antagonist in the minds of those that must ultimately determine the dispute between them, who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice, willfully seeks to corrupt the source and to dishonor the administration of justice."

This wholesome and vigorous code of morals and rule of conduct is just as necessary today as it was when it was established in the early history of these United States. It accords with the sense of right of all good and patriotic people, and those who live by slander must expect to suffer the just punishments which the law imposes for their crimes.

Among the ten commandments given by God to Moses was: "Thou shalt not bear false witness against thy neighbor." Exodus, c. 20, verse 16. And when Christ went into Judæa, teaching the people, one came unto Him, and said, "Good master, what good thing shall I do that I may have eternal life?" And He said unto him: "Why callest thou me good? There is none good but one. That is God. But if thou wilt enter into life, keep the Commandments. He saith unto him, 'Which?' Jesus said, 'Thou shalt do no murder; thou shalt not commit adultery; thou shalt not steal; thou shalt not bear false witness; honour thy father and thy mother; and thou shalt love thy neighbor as thyself.'" Matthew, c. 19, verses 17, 18, and 19. These

obligations are just as binding to-day as they have always been since they were thus promulgated. The laws of Moses also provided that, if a man slandered his wife, the elders of the city should chastise him, and should amerce him in an hundred shekels of silver, which should be given to the wife's father. Deut. c. 22, verses 13 to 19. "Coke says libeling and calumniation is an offense against the law of God." Paterson on Liberty of Press, etc., pp. 224, 225. Good people obey the laws, slander no one, and speak the truth. Others must do so, or be punished. Upon no other basis could good government rest, or the rights of the people be protected. A court that failed to enforce these laws would be so cowardly that it would be contemptible, and a disgrace.

It is material to investigate the history of the adoption of the constitutional guaranty of free speech, and to understand the evils it was intended to suppress. Cooley's Constitutional Lim. (6th Ed.), p. 513, says these constitutional provisions were not intended to confer any new rights, but simply to protect the citizen in those already possessed. It is then said: "At common law, however, it will be found that liberty of the press was neither well protected nor well defined. The art of printing in the hands of private persons, has, until within a comparatively recent period, been regarded rather an instrument of mischief than as a power for good, to be fostered and encouraged. Like a vicious beast, it

might be made useful if properly harnessed and restrained. The government assumed to itself the right to determine what might or might not be published; and censors were appointed, without whose permission it was criminal to publish a book or paper upon any subject." The learned author then points out that the censorship continued until the revolution of 1688, and it was a criminal offense to publish the proceedings of Parliament or of the courts, or even the current news of the day, without permission. He also shows that the same practice was followed in the American colonies until the Revolution, and that even after the Revolution "the public bodies of the united nation did not at once invite publicity to their deliberations. The Constitutional Convention of 1787 sat with closed doors, and, although imperfect reports of the debates have since been published, the injunction of secrecy upon its members was never removed. The senate for a time followed this example, and the first open debate was had in 1793." The same author, at page 516, then adds: "It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin; and commentators seem to be agreed in the opinion that the term itself means only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship. In a strict sense, Mr. Hallam says it consists merely in

exemption from a licenser. A similar view is expressed by De Lolme. 'Liberty of the press,' he says, 'consists in this: that neither courts of justice nor any other judges whatever are authorized to take notice of writings intended for the press, but are confined to those which are actually printed.' Blackstone also adopts the same opinion, and it has been followed by American commentators of standard authority [he refers to Story on Const., § 1889; 2 Kent, 17 et seq., and Rawle on Const. c. 10] as embodying correctly the idea incorporated in the constitutional law of the country by the provisions of the American Bill of Rights. It is conceded on all sides that the common-law rules that subject the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our Constitutions. The words of Parker, C. J., of Massachusetts, on this subject, have been frequently quoted, generally recognized as sound in principle, and accepted as authority. 'Nor does our Constitution or Declaration of Rights,' he says, speaking of his own State, 'abrogate the common law in this respect, as some have insisted. The sixteenth article declares that "liberty of the press is essential to the security of freedom in a State. It ought not, therefore, to be restrained in this commonwealth."' The liberty of the press, not its licentiousness; this is the construction which a just regard to the other parts of that

instrument, and to the wisdom of those who founded it, requires. In the eleventh article it is declared that 'every subject of the commonwealth ought to find a certain remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character'; and thus the general declaration in the sixteenth article is qualified. Besides, it is well understood and received as a commentary on this provision for the liberty of the press that it was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow-subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction."

This is the true rule. The liberty of the press means that any one can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the courts of his country, he is liable to be punished for contempt. If he slanders his fellow-men, he is liable to a criminal prosecution for libel, and to respond, civilly, in damages for the injury he does to the individual. In other words, the abuse of the privilege consists principally in not telling the truth. It is no new claim that newspapers have a

greater privilege than the ordinary citizen. This is a grave error. In King v. Root, 4 Wend. 113, 21 Am. Dec. 102, Chancellor Walworth said: "It has been urged upon you that conductors of the public press are entitled to peculiar indulgences, and have special rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity." And in Hotchkiss v. Oliphant, 2 Hill, 510, Chief Justice Nelson, speaking for the Supreme Court of New York, said: "It is made a point in this case, and was insisted upon in argument, that the editor of a public newspaper is at liberty to copy an item of news from another paper, giving at the same time his authority, without subjecting himself to legal responsibility, however libelous the article may be, unless express malice be shown. It was conceded that the law did not and ought not to extend a similar indulgence to any other class of citizens; but counsel said that a distinction should be made in favor of editors on the ground of the peculiarity of their occupation; that their business was to disseminate useful knowledge among the people; to publish such matters relating to the current events of the day happening at home or abroad as fell within the

sphere of their observation, and as the public curiosity or taste demanded; and that it was impracticable for them at all times to ascertain the truth or falsehood of the various statements contained in other journals. We are also told that, if the law were not thus indulgent, some legislative relief might become necessary for the protection of this class of citizens. Undoubtedly, if it be desirable to pamper a depraved public appetite or taste if there be any such, by the republication of all the falsehoods and calumnies upon private character that may find their way into the press, to give encouragement to the widest possible circulation of these vile and defamatory publications by protecting the retailers of them, some legislative interference will be necessary, for no countenance can be found for the irresponsibility claimed in the common law. That reprobates the libeler, whether author or publisher, and subjects him to both civil and criminal responsibility. His offense is there ranked with that of the receiver of stolen goods, the perjurer and suborner of perjury, the disturber of the peace, the conspirator, and other offenders of like character. * * * The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and, when called on by the aggrieved party, the publisher should be held strictly to the proof. If he chooses to become the indorser and re-

tailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but, if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals, and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community."

Time was, when, if any citizen or newspaper insulted or slandered or maligned a citizen, the injured party demanded satisfaction according to the code of honor, and, if this was refused, treated the offender as a mad dog is usually dealt with. It is worthy of notice that in those days every one was careful to tell the truth about his fellow-men, and equally careful to avoid scandalizing them. But even in those days there were occasional breaches of decency in this regard, which were promptly dealt with. A sentiment, however, grew up that such a method settled nothing; that the innocent party was as liable to be removed or hurt as the guilty, and that the result did not show which told the truth. Thus public sentiment discouraged, if it did not forbid, such a method of settling such grievances, and it was insisted that the remedies afforded by the laws were ample to

properly handle all such matters, and hence that any one aggrieved must not take the law in his own hands, but must let the courts settle it. So the old method has become nearly obsolete; but even now it is occasionally resorted to when the offense is peculiarly aggravated, and so indecent that it is impossible for human nature to stand it.

Now, it is gravely argued by libelers that the liberty of the press includes a right to scandalize courts, to libel and slander and utter the most flagrant and indecent calumnies about public officers, and even private citizens, and to invade the sanctuaries of the churches, the temples of justice, or the sacredness of the home and the private family, and without any good motive, or for any public purpose, to publish the most cruel, false, and scandalous articles concerning them. And there are newspapers that have so far misconceived their proper functions, or been misguided by other considerations, as to indulge in such practices. And there is always a class of moral perverts and degenerates in every community who feed their morbid appetites upon such scandals, and rejoice at the injury thus done to those who are so infinitely their superiors that they are not worthy to fasten the latchet of their shoes. But, to the credit of the newspaper profession, it is due to here make a record of the fact that the great majority of the members of that profession do not approve or sanction such practices or such "yellow" journalism, but have a proper ap-

preciation of the rights and purposes and functions of a newspaper, and deplore the fact that such unworthy persons are engaged in the profession, as much as lawyers deplore the black sheep that will sometimes creep into the fold. The contrast between the two classes marks the difference between respectability and indecency, between intelligence and ignorance, between the law abiding, patriotic citizen and the Ishmaelite — the assassin of character for the accumulation of lucre. The great body of the people condemn such practices and such miscreants, and the courts would deserve condemnation and abolition if they did not vigorously and fearlessly punish such offenders. Such practices are an abuse of the liberty of the press, and if the slander relates to the courts it concerns the whole public, and is therefore punishable summarily as a criminal contempt; and if it concerns an individual it is punishable civilly and criminally as for a libel.

There is no species of property and no class of people that need the protection of the law as much as newspapers and editors, and they would feel the loss of such protection more speedily and more acutely than any one else. Self-interest should, therefore, induce them not to impair the power or authority of the courts, and not to inculcate a feeling of disrespect or want of confidence in the courts. Curran called the liberty of the press a "sacred palladium." But without the shield and the bulwark of the law and the

courts, even the Goddess Pallas would be unable to protect the press, or to preserve the rights and safety and peace of the people. Without the law and the courts, chaos and anarchy would prevail. There would be no protection for life, liberty, property, or character. He, therefore, who seeks to destroy the authority of the courts, invites anarchy, and sows seed for his own undoing. It is the liberty of the press that is guarantied, not the licentiousness. It is the right to speak the truth, not the right to bear false witness against your neighbor. Every citizen has a constitutional right to the enjoyment of his character as well as to the ownership of his property, and this right is as sacred as the liberty of the press. In King v. Burdett, 4 Barn. & Ald. 95, it was said: "The liberty of the press cannot impute criminal conduct to others without violating the right of the character, and that right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. *Where vituperation begins, the liberty of the press ends.*" (The italics are added.) It must be clearly understood and always borne in mind that there is a vast difference between criticism or fair comment on the one side and defamation on the other. Odgers on Libel & Slander, page 35, says: "Every one of the public is entitled to pass an opinion on everything which in any way invites public attention. Those of the public whose opinion on such matters

is best worth having are called 'critics.' From their character, ability, or experience they can judge with precision (which is the true meaning of the word 'criticise'), and their opinion, therefore, is entitled to respect. Their criticism may be commendatory, but it is, perhaps, more generally unfavorable. Still, so long as it continues to be criticism at all, it is not defamatory. Where defamation commences true criticism ends. True criticism differs from defamation in the following particulars: (1) Criticism deals only with such things as invite public attention or call for public comment. (2) Criticism never attacks the individual, but only his work. Such work may be either the policy of the government, the action of a member of Parliament, a public entertainment, a book published, or a picture exhibited. In every case the attack is on a man's acts, or on some thing, and not upon the man himself. A true critic never indulges in personalities. (3) True criticism never imputes or insinuates dishonorable motives (unless justice absolutely requires it, and then only on the clearest proofs): (4) The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste." The same author quotes with approval the language of Huddleston, B., in Whistler v. Ruskin, where he says: "A critic must confine himself to

criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the love of exercising his power of denunciation." And the author adds (page 38): "But all comments must be fair and honest. Matters of public interest must be discussed temperately. *Wicked and corrupt motives should never be wantonly assigned* [The italics are added.] And it will be no defense that the writer, at the time he wrote, honestly believed in the truth of the charges he was making, if such charges be made recklessly, unreasonably, and without any foundation in fact. Some people are very credulous, especially in politics, and can readily believe any evil of their opponents. There must, therefore, be some foundation in fact for the charges made. The writer must bring to his task some degree of moderation and judgment." The author also quotes with approval the language of Cockburn, C. J., in Campbell v. Spotteswoode, 32 L. J. Q. B. 199: "A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated. One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation."

Paterson on Liberty of Press, etc., p. 131, says: "While, therefore, it is lawful for any one to publish a report of a proceeding in a court of justice, still this must be a fair and authentic report of what happened. If the report is mixed up with comments showing an animus against a party, and giving an unfair impression, the publisher then ceases to have the benefit of this absolute protection." The author is discussing the liberty of the press.

The courts of other States have held that it is libelous to charge an officer with having taken a bribe, or with corruption, or want of integrity. In such cases the publisher must stand ready to prove the truth of his charges, or he will not go unwhipped of justice. Hamilton v. Eno, 81 N. Y. 116; Wilson v. Noonan, 35 Wis. 321; Gove v. Blethen, 21 Minn. 80; 18 Am. Rep. 380; Russell v. Anthony, 21 Kan. 450; 20 Am. Rep. 436; Littlejohn v. Greeley, 13 Abb. Prac. 41; Bole v. Van Renselaer, 1 Johns. Cas. 330; Negley v. Farrow. 60 Md. 158; 45 Am. Rep. 715; Neeb v. Hope, 111 Pa. 145; 2 Atl. 568.

It is pertinent and profitable to set out a few of the cases wherein the courts of other jurisdictions have summarily punished persons as for a criminal contempt on account of publications which were calculated to bring public odium upon the court.

The case of Respublica v. Oswald, 1 Dall. 319, 1 L. Ed. 155, has already been referred to.

In Respublica v. Passmore, 3 Yeates, 441, 2 Am. Dec. 388, the defendant was fined $50 and sent to jail for 30 days for publishing an article reflecting upon one of the parties to a pending cause, which tended to interfere with the course of justice.

In People v. Freer, 1 Caines, 518, the defendant published, in the Ulster *Gazette*, certain comments concerning a trial that had occurred in court, that were calculated to prejudice and influence the public mind against the court, and to intimidate and influence the court in deciding a motion for a new trial that was then pending. He was punished for contempt. The court said: "Publications scandalizing the court, or intending unduly to influence or overawe their deliberations, are attempts which they are authorized to punish by attachment; and, indeed, it is essential to their dignity of character, their utility and independence, that they should possess and exercise this authority."

In Tenney's Case, 23 N. H. 162, the defendant, who had no interest in a pending action, except that his son had sued one of the defendants and had lost, caused copies of the petition in the pending action, which contained serious charges against the defendants, to be published and circulated among persons with whom the defendants had business relations, in which he said he could stop the suit if the defendants would pay him $1,000 — that being the amount he said he

had lost by his son's unsuccessful suit against the defendants. It was held that "such conduct tended to obstruct the free course of justice, and was a contempt of court," and a rule in attachment was granted.

For publishing an account of a trial for treason when the court had forbidden any publication of it, because like cases were pending against other persons, whose rights might be affected, the defendant, as editor of the *Observer*, was fined £500 by the Court of King's Bench in England in 1821. King v. Clement, 4 Barn. & Ald. 218.

In Sturoc's Case, 48 N. H. 428, 97 Am. Dec. 626, the defendant, a member of the bar, was punished as for a criminal contempt for publishing a communication in a newspaper respecting a prosecution under the liquor laws of that State, which tended to prejudice the minds of the people against the case.

In State v. Morrill, 16 Ark. 384, the defendant, as editor of the Des Arc *Citizen*, published an article in which, by implication, he charged the judges of the Supreme Court of Arkansas with having been bribed to render a certain decision in a habeas corpus case that had been finally decided by that court. Upon the publication being called to the attention of the court by a communication addressed to one of the judges of the court by a member of the bar, the court issued a rule to show cause. The defendant pleaded the statute of that State prescribing that in certain instances, and no others, the court

could punish for contempt. It was admitted that the act complained of did not fall within the terms of the statute, and it was claimed that the court had no power to punish for any other kind of a contempt than that specified in the statute. The statute was, in ipsissimis verbis, exactly like section 1616, Rev. St. Mo. 1899. It will be observed that the charge was practically the same in that case as in the case at bar, and that the statute relied on in that case is exactly like our statute. The court held the statute to be beyond the power of the Legislature to enact, and that the power to punish as for a criminal contempt was inherent in the court. The court also held, as stated in the headnote, that: "Any citizen has a right to comment upon the proceedings and decisions of this court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right, under the seventh section of the Bill of Rights, to attempt, by libelous publications, to degrade the tribunal, etc. Such publications are an abuse of the liberty of the press, for which he is responsible." It was also objected that it was not a contempt of court, because it did not relate to a case then pending, and therefore the rights of no party litigant were affected by it. But the court referred to the adjudications — particularly Commonwealth v. Dandridge, 2 Va.

Cas. 409, presently to be cited — and said: "The case above cited (and many more might be cited if deemed at all necessary) abundantly show that by the common law courts possessed the power to punish as for contempt libelous publications of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy public confidence and respect for their judgments and decrees, so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice." Accordingly, the defendant was punished summarily as for a criminal contempt.

In Commonwealth v. Dandridge, 2 Va. Cas. 409, the court at a prior term had decided a case against the defendant. He met the judge at the door of the courthouse, before the opening of court for the next term, and grossly insulted him, charging him with corruption and cowardice in the decision of his case. He was cited for contempt, and it was objected that the act did not relate to a pending cause. The case was transferred to the general court of the State, and that court, speaking to this point, said: "Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective con-

duct of the judge, but not so far as touch his past conduct. In reason I see but one pretense for this distinction. Threats and menaces of insult or injury to a judge in case he shall render a certain judgment may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a judge, 'If he render a certain judgment against me, I will insult or beat him.' For this he may be attached. But if (the judgment having been rendered) this insult be actually offered, an attachment no longer lies, because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles — the only true test — by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

In the case of In re Pryor, 18 Kan. 72, 26 Am. Rep. 747, the court finally decided a case, and the attorney for the losing party wrote a letter to the judge, saying the decision "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe. * * * It is my desire that no such decisions or orders shall stand unreversed in any court I practice in." The court held that it was a criminal contempt, fined

him $50, and suspended him from practice until the fine was paid, and the Supreme Court affirmed the judgment.

In the case of In re Woolley, 11 Bush, 95, the defendant as attorney for the losing party, filed a motion for rehearing, in which in a supercilious and dogmatic style, he charged "that the court had overlooked the facts of the case; that it had assumed facts having no place in the proof, and ignored others which stood out on every page of the record; that it was careless and indifferent to the rights of a litigant, and that the result of this carelessness and indifference was a ruinous, disastrous, and unjust judgment against a party wholly innocent of all offense." The court pronounced the offense to be "of a nature too grave to be silently overlooked." The defendant was cited for contempt, and disclaimed, under oath, any intention to commit a contempt, and in consideration of this condition his fine was assessed at the nominal sum of $30.

In People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528, the defendant, the editor of the Chicago *Evening Journal*, published, in 1872, an article with reference to a case then pending in the Supreme Court, in which he reflected on the action of the court in that case, impeached its integrity, and sought to intimidate the action of the court by threat of popular clamor. He was cited for criminal contempt, and fined $100. In this case the court adopted the rule laid down by Bishop's Crim-

inal Law, § 216, wherein it is said: "According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt."

In the case of In re Chadwick (Mich.), 67 N. W. 1071, the defendant, as attorney for the losing party, in a case that had been decided by the Supreme Court of Michigan, wrote and published, in 1896, an article in the Port Huron *News*, criticising the decree, and in it charged the judge with unfairness and improper conduct. The Supreme Court of Michigan held it to be a contempt of court, and that the power to punish for contempt existed as well after a case was finally disposed of as where it was still pending. The attachment was issued in this case upon a petition of the members of the bar informing the court of the contempt.

In Fishback v. State (Ind. Sup.), 30 N. E. 1088, the defendant, as editor of the Terre Haute *Express*, published, in 1892, a certain article reflecting upon the grand jury, the judge of the circuit court, the prosecuting attorney, and the city engineer, and casting doubt upon their integrity and honesty with respect to the investigation and punishment of certain street improvement contractors.

The defendant denied any intention to commit a contempt. It was held that, where a matter was libelous per se, the denial of the defendant that he intended to commit a contempt would not avail him, but, if the article was not per se libelous, but could be made so only by innuendo, the defendant would be discharged upon showing that he intended no contempt.

In People ex rel. Conner v. Stapleton (Colo. Sup.), 33 Pac. 167, 23 L. R. A. 787, William Stapleton and Kemp G. Cooper, editors of the Denver *Republican*, were cited for contempt in publishing, in 1893, an article in the paper "implying that the Supreme Court has been induced by improper influences to delay rendering a decision" in a certain cause. The court said of the article: "It is not merely a private wrong against the rights of litigants and the judges. It is a public wrong, a crime against the State, to undertake by libel or slander to impair confidence in the administration of justice. That a party does not succeed in such undertaking lessens his offense only in degree." The court also held that the power of the court to punish for contempt was not limited by the provision of the Code which attempted to define the cases in which the court could punish for contempt, and also held that the liberty of the press was not in any way impaired by the court punishing as for a contempt the abuse of such liberty.

In Cooper v. People (Colo. Sup.), 22 Pac.

790, the defendant, as editor of the Denver *Republican*, published in 1889 an article reflecting upon the manner in which a certain pending case was being tried by the court. He was cited for contempt. He also demanded a trial by jury, and pleaded the liberty of the press. A jury trial was denied him. And touching his other plea, the court said: "We would not for a moment sanction any contraction of the freedom of the press. Universal experience has shown that such freedom is necessary to the perpetuation of our system of government in its integrity, but this freedom does not license unrestrained scandal. By a subsequent clause of the same sentence of our State Constitution in which the liberty of the press is guarantied, the responsibility for its abuse is fixed. With us the judiciary is elective, and every citizen may fully and freely discuss the fitness or unfitness of all candidates for the positions to which they aspire; criticise freely all decisions rendered, and by legitimate argument establish their soundness or unsoundness; comment on the fidelity or infidelity with which judicial officers discharge their duties; but the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass, or corrupt that due administration of justice which is so essential to good government, cannot be sanctioned." Id., loc. cit. 799.

Burke v. Territory of Oklahoma, 2 Okl.

499, 37 Pac. 829, was an attachment for contempt against the defendant for publishing in 1894, in the Oklahoma *Times-Journal*, an article respecting a report of the grand jury, where the question was whether it should be received by the court or returned to the grand jury, and in which article it was said that the judge's actions indicated that he intended to withhold the report, and adding that, if the judge persisted in carrying out such intention, it might be characterized as a flagrant violation of the people's rights, and that the action of the court "is an effort to browbeat the grand jury, an effort to bend the grand jury to the will of the court, and a serious matter." It was held to be a criminal contempt, and the punishment fixed at a fine of $250 and imprisonment for 10 days. It was also held that the Legislature had no power to limit or regulate the inherent power of a court to punish contempts, and that in contempt cases the defendant was not entitled to a trial by jury.

In Little v. State, 90 Ind. 338, 46 Am. Rep. 224, decided in 1883, it was held that the power of the courts to punish for contempt is inherent, and cannot be prevented or abridged by legislative action, and that an attempt to create the belief that a juror or officer of court can be bribed is a contempt of court. See, also, Hawkins v. State, 125 Ind. 570, 25 N. E. 818.

Other instances where public officers have resorted to a private action of libel to remedy

the wrong can be found in the following cases: Neeb v. Hope, 111 Pa. 145, 2 Atl. 568; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Dole v. Van Rennsselaer, 1 Johns. Cas. 330; Littlejohn v. Greeley, 13 Abb. Prac. 41; Russell v. Anthony, 21 Kan. 450, 30 Am. Rep. 436; Gove v. Blethen, 21 Minn. 80, 18 Am. Rep. 380; Wilson v. Noonan, 35 Wis. 321; Hamilton v. Eno, 81 N. Y. 116.

Thus at great pains and tedious length the cases bearing upon the matters involved in this case have been collected and digested, with the purpose and to the end that the people may know the grounds upon which the judgment in this case rests, and so that all others may know the law, and avoid being guilty of like offenses, or else offend knowingly, and hence invite inevitable punishment.

There was nothing in the case to which the article in this case referred to call for any such scandalizing of the court. The case arose prior to the fellow-servant law. It was a case wherein a brakeman was injured by a wreck of the train on which he was working. He based his right to recover upon the ground that the master had failed to furnish safe appliances with which to do the work, in consequence of which the injury was received. The unsafe appliance was alleged to be a freight car that had unsafe sills, which were so rotten that the car broke down from its own infirmity while still on the track. The defense was that the wreck was

caused by the forewheels of the alleged unsafe car jumping the track, and that the car was whole when it left the track, and broke afterwards, and hence that the injury was caused by a risk which the plaintiff assumed when he entered the master's service, and not by any negligence of the master in furnishing the servant unsafe appliances. A majority of the court was of the opinion that there was absolutely no evidence whatever to support the plaintiff's case, while the minority of the court was of opinion that there was such evidence, or at least enough thereof to take the case to the jury. No one believed or dared to charge another with dishonesty of opinion or action, and there was no foundation in fact and in truth for any such charge. There was therefore no legal justification or excuse for the article that was published by the defendant. He did not dare attempt to prove or claim that it was true, but stood mute as to that, and sought to escape punishment on other grounds which were untenable. He was therefore guilty of malice. He abused the liberty of the press and made himself liable therefor. Let the honest, fair-minded, patriotic people of this State say whether or not it was not the duty of the court to punish him. The courts of this State have been conservative in the extreme, and forbearing to a fault. They have overlooked remarks concerning their acts, from lawyers and laymen, that were improper and outside of the pale of the law, preferring, if possible,

to attribute the offense to the zeal of counsel or the excitement of the laymen, incident to disappointment of personal hopes and ambitions. They have been considerate of the feelings and character of others, and have many times abstained from the use of strong language, under trying provocation, in deciding cases. And it was proper to do so. But the protection and safety of life, liberty, property, and character, the peace of society, the proper administration of justice, and even the perpetuity of our institutions and form of government, imperatively demand that every one — lawyer, layman, citizen, stranger, newspaper man, friend or foe — shall treat the courts with proper respect; shall not attempt to degrade them, or impair the respect of the people, or destroy the faith of the people in them. When the temples of justice become polluted or are not kept pure and clean, the foundations of free government are undermined, and the institution itself threatened. The people have no fear of their courts abusing their power to punish for contempt or in any other respect. Alexander Hamilton, in advocating the adoption of the provisions of the Federal Constitution relating to the judiciary, said: "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in

a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or the wealth of society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty." Federalist, p. 355. This view is indorsed by Judge Story in his treatise on the Constitution (volume 2, 4th Ed., p. 401). It may well be said that courts depend, for their existence, usefulness, and efficacy, upon the consent of the people. They must depend, first, upon the loyalty, the intelligence, and the counsel of the bar to the people; second, upon the faithful communication by the high-minded, intelligent, and truthful members of the newspaper profession to the reading public, of their acts and conduct and judgments; and, third, upon the wisdom, the honesty, and the patriotism and sense of justice and fair play, of the great body of the people, who have established these institutions, clothed them with dignity and power, elected the judges to serve them as their judicial agents, and who have never

failed, in the long run, to distinguish between right and wrong, between the true and the false, between the faithful and the faithless servants, and who have no patience with slanderers, or those who live by or feed upon slanders. To be a judge over such people is the highest honor that can be conferred upon mortal man. To be a judge, without such powers as a judge, were to be a kicking post for every madman, a butt for every idiot or knave, and, withal, an object of contempt of all men. Unfortunately, there must always be a losing as well as a winning party to every suit, and courts must needs inflict pain as well as impart joy by every judgment rendered. But the loser to-day may be the winner in another case to-morrow. And so, if every loser was privileged to go to the tavern and "cuss the court" to-day, he would necessarily have to retract his reproaches and praise the court to-morrow, when he is a winner. So it is in life. It is nearly always true that one man's loss is another man's gain. But life is not a failure, and business is not a fraud and to be condemned for such reasons. "Do unto others as ye would others should do unto you," do not bear false witness against your neighbor, keep the commandments, obey the laws, tell the truth, be honest to yourself as well as to your fellow-man, bear no malice, but judge all men with charity, and life will be sweeter and more profitable, and the world will be better, and your neighbor's faults will not appear quite so unpardonable.

In this spirit the judgment in this case was entered, and in this spirit let it be judged.

What is herein said in no matter whatever conflicts with what was said in Marx & Haas Jeans Clothing Company v. Watson, 168 Mo. 133, 67 S. W. 397, 56 L. R. A. 951, 90 Am. St. Rep. 440. That was a suit in equity to enjoin a boycott, and it was held that injunction would not lie to restrain the utterance of a libel or slander, or to restrain free speech. It was held there, as it is here, that every one may speak, write or publish what he will, but is responsible for the abuse of the privilege. 168 Mo. loc. cit. 150, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440. That case, as well as this, holds that the courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so.

For these reasons, the defendant in this case was adjudged guilty of contempt.

Robinson, C. J., and Brace, Gantt, Burgess, Valliant, and Fox, JJ., concur.

TABLE OF CASES CITED.

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The cases of Lyon, Haswell, Cooper and Callendar under the Sedition Law of 1798 can be found in Wharton's State Trials, 1 vol., and the cases of Zenger, McDougall, Parks and Crosswell in Hudson's Journalism in the United States and Merrill's Newspaper Libel.

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